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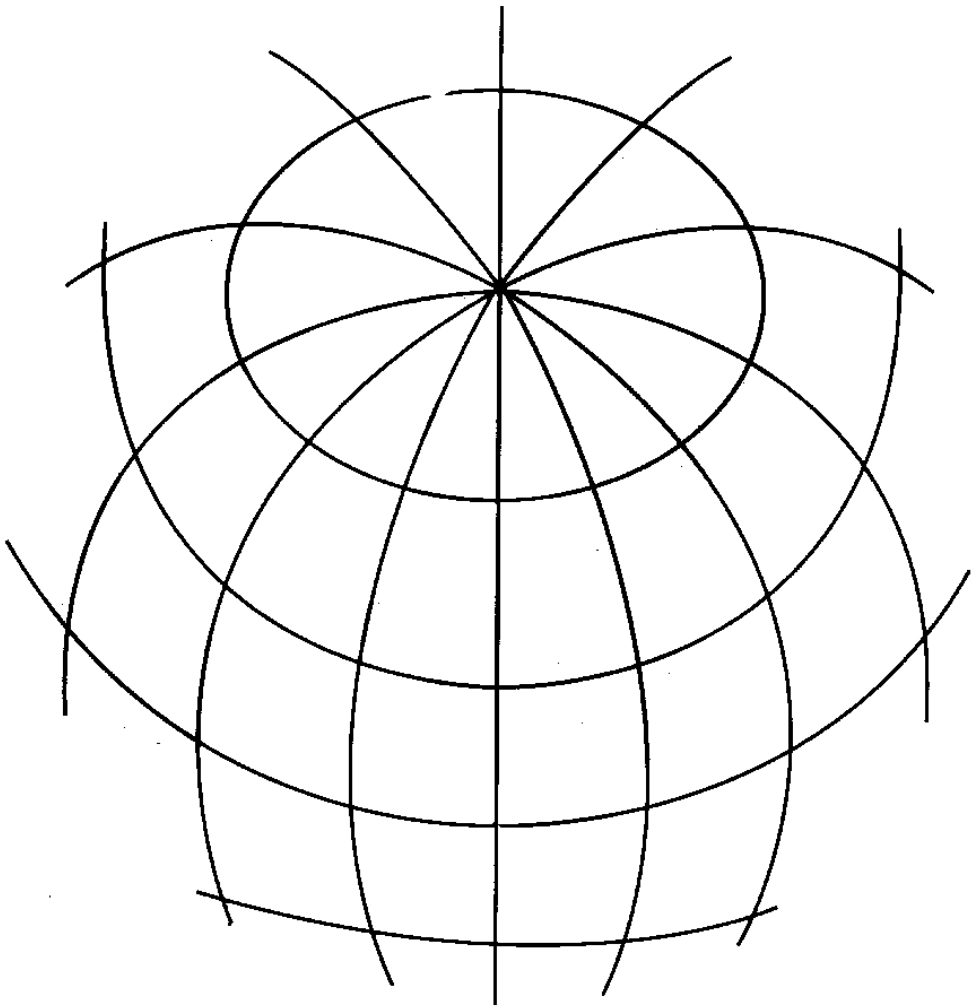

REVISTA BRASILEIRA
DE
POLÍTICA INTERNACIONAL

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O Instituto Brasileiro de Relações Internacionais é uma associação cultural independente, sem fins lucrativos, mantida por contribuição de seus associados, doações de entidades privadas e subvenções dos poderes públicos. É seu objetivo promover e estimular o estudo imparcial dos problemas internacionais, especialmente dos que interessam à política exterior do Brasil.

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condução do Instituto e da
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Cleantho de Paiva Leite (1921-1992)

Sérgio Bath

No dia 7 de outubro de 1992 faleceu, no Rio de Janeiro, Cleantho de Paiva Leite.

Para os muitos que o conhecíamos e estimávamos, ele foi, simplesmente, Cleantho. Natural de João Pessoa, na Paraíba, ali nasceu em 24 de março de 1921. Com dezessete anos saiu do seu Estado, onde era bibliotecário, para fixar-se no Rio de Janeiro. Em 1942 ingressou no DASP, por concurso. Entre 1943 e 1944 foi membro da Missão Brasileira de Assistência Técnica ao Paraguai. Neste último ano concluiu o curso de Direito, e em seguida passou alguns meses em Londres, como bolsista do British Council, pesquisando a administração colonial britânica na London School of Economics. Logo depois ingressou na Organização das Nações Unidas, onde trabalhou até 1951, como funcionário do Conselho de Tutela, tendo sido um dos principais assessores de Ralph Bunche.

Durante o segundo Governo Vargas (1951-54) Cleantho, de volta ao Brasil, integrou a assessoria econômica do Presidente da República, juntamente com Rômulo de Almeida, Inácio Rangel, Jesus Soares Pereira, e outros. A coleção de bilhetes e anotações da mão do Presidente, que guardava com carinho, testemunha sua proximidade de Vargas, personalidade que lhe causou forte impressão. Esse foi para ele um período de grande fertilidade, tendo atuado no planejamento da reforma do setor público e na incorporação do Banco do Nordeste do Brasil; foi também Representante do Brasil no UNICEF e Diretor do BNDE – cargo que ocuparia desde agosto de 1953 até 1962, com um hiato entre 1956 e 1958, período em que esteve licenciado.

Em 1957 Cleantho foi nomeado Chefe de Gabinete do Ministro da Viação e Obras Públicas, Lúcio Meira. Em dezembro de 1958 atuou como Delegado do Brasil na conferência que preparou os estatutos do Banco Interamericano de Desenvolvimento, instituição a que se ligaria por muitos títulos. A partir de fevereiro de 1960 foi Diretor Executivo do BID, em representação do Brasil, Equador e Haiti. Re-eleito para o período 1963-1966, renunciou em dezembro de 1964, quando, designado pelo Presidente Felipe Herrera, de nacionalidade chilena, assumiu a representação do Banco em Santiago.

Cleantho retornou ao Brasil em 1968, para dedicar-se ao setor privado, tendo participado da direção do Grupo Ipiranga. Vice-Presidente da Associação Brasileira de Indústria Química e Produtos Derivados (Abiquim), teve atuação marcante e inventiva em várias empresas do setor de fertilizantes. Mas até o fim da vida era a atividade pública que mais o fascinava, e especialmente as relações internacionais. Terminou seus dias como Presidente do IBECC – o Instituto Brasileiro de Educação, Ciência e Cultura, órgão nacional da UNESCO.

Cleantho estivera em todas as partes do mundo, e gostava de lembrar que era dos poucos brasileiros a ter visitado Samoa, aonde o levou uma missão de avaliação das Nações Unidas, em 1947.

Em 1954, fundou o Pioneiro Instituto Brasileiro de Relações Internacionais. Numa época em que fora do Itamaraty o assunto despertava interesse limitado, deu início à publicação da primeira revista brasileira dessa especialidade – a Revista Brasileira de Política Internacional, que conseguiu manter até o presente, ao longo de 38 anos, em que precisou enfrentar e vencer incontáveis dificuldades. A "Revista do IBRI", como era conhecida, divulgou muitos artigos e documentos relativos à diplomacia brasileira, difundindo-os nos meios acadêmicos.

Para citar um só exemplo, foi essa publicação que despertou no Brasil interesse pelo tema da Antártica, na época virtualmente ignorado, ao publicar artigo do Diplomata João Frank da Costa.

Em todas essas atividades, Cleantho marcou sua presença pelo otimismo, a disposição para o trabalho, o espírito criativo; a seriedade de propósitos temperada por perene bom humor. Em toda parte, em muitos países fez numerosos amigos; no Itamaraty, no DASP, no BID, no BNDE, era uma figura carinhosamente respeitada. Conheceu bem a sua geração, e quando falava sobre o passado reconstruia com riqueza de pormenores e acentos pessoais a trama de muitas vidas, comentando-as com sorriso ameno, a percepção aguda de humor e empatia. Realista, compreendia e aceitava os defeitos alheios, que coloria com benevolência; mantinha-se conciliado com o mundo, acentuando sempre o melhor, em todos e em tudo.

Cultivava intensa dedicação aos amigos, que fazia questão de servir. Nada o agradava mais do que receber a encomenda de um livro recém-publicado, dar um conselho, uma indicação útil. A amizade era para ele uma arte, que praticava com prazer.

Cleantho deixou viúva – a Senhora Maria Cecília de Freitas Leite, que o acompanhou em toda a sua longa trajetória – e três filhos: Cleantho e Mariana, engenheiros; Daniel, fotógrafo e comunicador visual.

Deixou também um exemplo de trabalho, equilíbrio e constância, além de muitos amigos, que guardarão carinhosamente sua lembrança luminosa.

A CONSTRUÇÃO NAVAL NO BRASIL, SUAS PERSPECTIVAS E SEUS PROBLEMAS*

M. Pio Corrêa

A construção naval no Brasil tem uma longa história e honrosas tradições. Os milhões de passageiros que anualmente transitam pelo Aeroporto Internacional do Galeão não sabem que ele deve o seu nome, como o deve a Ponta do Galeão em que está situado, a um *galeão* de verdade, que foi ali construído em 1647, por ordem do Governador do Rio de Janeiro, Salvador Corrêa de Sá e Benevides – o "Governador" a que se refere o nome da nossa Ilha do Governador. Esse galeão, a que foi dado o nome de "Padre Eterno", foi uma das maiores unidades construídas em sua época, montando 50 canhões e tripulado por uma guarnição de 300 homens.

Um século mais tarde, foram criados dois Arsenais de Marinha, um no Rio de Janeiro e outro em Belém do Pará, que lançaram simultaneamente, em 1767, duas naus de 64 canhões, que receberam respectivamente os nomes de "Belém" e "São Sebastião".

No século XIX, começou no Brasil a construção de embarcações a vapor, o estaleiro civil da Ponta d'Areia em Niterói, ainda hoje existente sob o nome de "Estaleiro Mauá", entregando à Marinha Imperial, em 1838 e 1839, os Avisos a vapor "Cassiopeia" e "Fluminense". Em 1843 o Arsenal de Marinha do Rio de Janeiro lançava o Navio-transporte a vapor "Tethys". De 1850 em diante, enquanto o Governo Imperial adquiria no estrangeiro, para as necessidades das operações no Prata, fragatas e corvetas a vapor, a indústria nacional contribuia para o aparelhamento da Esquadra fornecendo-lhe outras unidades a vapor, movidas a rodas, enquanto o Arsenal de Marinha continuava a construir, por seu lado, navios movidos a hélice, de casco de ferro, inclusive encouraçados e monitores, fabricando também as máquinas para os mesmos.

Somos, portanto, os herdeiros dessa longa tradição, que reflete uma imperiosa vocação do Brasil como Potência marítima e acode às necessidades geo-políticas, estratégicas e econômicas de nossa Pátria, cuja segurança, prosperidade e soberania dependem hoje,

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* Baseado em texto de Conferência na Escola de Guerra Naval.

como sempre e mais do que nunca, do livre uso das rotas marítimas que transportam mais de 90% de nosso comércio exterior, e da proteção dessas rotas e de nossas extensas costas, prolongadas pela faixa de nosso mar territorial e da zona contígua onde também temos direitos e interesses a resguardar.

Para atender a esses requisitos de nossa Soberania nacional necessitamos de meios flutuantes adequados, tanto militares quanto mercantes. Para dispormos de um Poder Marítimo comensurado à nossa presença econômica e política no Continente e no mundo, e do Poder Naval de que é parte aquele Poder Marítimo e que por sua vez o afiança, não pode o Brasil prescindir de uma Indústria de Construção Naval de capacidade e nível técnico suficientes para que não vivamos na dependência de estaleiros estrangeiros.

Essa indústria existe. Após um hiato de meio século durante o qual nos deixamos distanciar pelos rápidos progressos técnicos e pela capacidade empreendedora da construção naval em outros países, ela renasceu pelo esforço conjugado de governantes e de industrias brasileiras. Ela renasceu, convém dizê-lo aqui bem alto, do pensamento clarividente e do patriotismo de um marinheiro, do então Comandante, hoje Almirante, LÚCIO MEIRA, Ministro da Viação no Governo Juscelino Kubitschek. Aquele grande brasileiro teve a visão clara de que a grandeza da Nação na segunda metade do século XX exigia imperiosamente uma política de Transportes cobrindo os três campos, ferroviário, rodoviário e marítimo; e de que somente a existência em nosso próprio verdadeiro criador no Brasil da indústria automobilística, da indústria ferroviária *e da moderna indústria de construção naval.*

Ao seu apelo, poderosas empresas estrangeiras vieram apostar no futuro do Brasil, investindo aqui grandes capitais e para aqui trazendo os mais adiantados recursos técnicos; com seu apoio, indústrias brasileiras, outrora florescentes mas desde décadas adormecidas em letargo por falta de condições adequadas, despertaram e prosperaram. No espaço de vinte anos, *perto de dois bilhões de dólares, dos quais nem um centavo saiu dos cofres públicos*, foram investidos na criação ou renovação de estaleiros. Dois gigantes da construção naval internacional, CORNELIS VEROLME da Holanda, TOSHIO DOKO do Japão, apaixonaram-se pelo Brasil e por suas perspectivas, e para aqui trouxeram, não apenas grandes capitais e avançadíssimos recursos técnicos, mas amor e confiança, engajando-se pessoalmente no grande desafio para o qual os convocava Lúcio Meira. Empresários brasileiros, alguns deles herdeiros de antigas tradições navais, despertaram para a luta com igual energia e sadio espírito de emulação.

Foi assim que atingimos uma capacidade de produção de *dois milhões de toneladas anuais*, colocando o Brasil em honrosa segunda posição entre os países construtores de navios, sobrepassando países que desde séculos detinham histórica posição de pré-eminência nesse campo.

Coloca-se aqui uma pergunta: será que nosso esforço foi demasiado ambicioso, será que superdimensionamos nossa capacidade de produção?

A resposta é um rotundo **NÃO**.

Um país que, recordemos ainda, depende de transporte marítimo para movimentar a quase totalidade de suas exportações e importações; um país com uma fachada marítima de 4.000 milhas; um país que produz mais de vinte milhões de toneladas anuais de aço que é a matéria prima da construção naval; um país que fabrica um largo espectro dos demais insumos para aquela indústria; um país que dispõe fartamente de mão-de-obra habilitada a trabalhar nela; um país cuja posição geográfica o defronta com as rotas mais vitais do tráfego marítimo internacional; um país com portos em águas profundas capazes de abrigar os maiores navios jamais construídos; esse país é chamado por vocação irrefutável a ser um participante de primeira grandeza no mercado mundial de navios, além de atender a uma ainda enorme demanda reprimida de sua própria frota mercante face ao papel que esta deve desempenhar.

Durante muitos anos, é certo, essa capacidade foi sub-empregada; em parte é certo também, por aspectos desfavoráveis de conjuntura internacional, por exemplo o desmoronamento dos fretes ocorrido em conseqüência dos "choques do petróleo", e que acarretou uma brutal retração de encomendas por parte dos armadores, que se viram a braços com enorme volume de tonelagem ociosa, quando haviam "apostado" em uma sustentação das altas taxas de frete e colocado grandes encomendas nos anos imediatamente anteriores aos "choques".

No caso particular da indústria brasileira, porém, o mal que a atingiu e que a levou a um marasmo desolador foi devido também e sobretudo à indiferença, à falta de visão, e às vezes à hostilidade de órgãos públicos que, obsecados com uma política rodoviária altamente rentável em termos de votos e de "badaladas" inaugurações ou pré-inaugurações, sem falar de outros aliciantes menos confessáveis, negligenciaram os dois outros, e essenciais, aspectos do tríptico de uma política de transportes inteligente e eficaz, a saber, a malha ferroviária – relegada, abandonada, reduzida ou sucateada – e os transportes marítimos, com o resultado insensato de que cargas são transportadas por caminhão de Belém do Pará ao Porto do Rio Grande – exemplar aberração econômica.

Outro paradoxo lamentável, e que se traduz também em falta de encomenda para estaleiros nacionais de menor porte, é que em um país que dispõe do maior sistema potamográfico do mundo, as cargas chegam às cidades ribeirinhas de grandes rios levadas pelo "rei caminhão".

Residi vários anos em uma casa sita à margem do Reno. Quando assomava a uma janela, via o grande rio sulcado por embarcações de seis bandeiras diferentes, trafegando de Basiléia ao pé dos Alpes até Rotterdam no Mar do Norte. Mas via também, em cada uma das margens do rio uma grande rodovia; e em cada uma das margens do rio uma linha ferroviária. Cada carga, conforme a sua natureza, encontrava o modo de transporte economicamente adequado. Não aprendemos ainda essa lição: precisamos ainda aprender a soletrar a palavra MULTIMODAL. A questão calamitosa dos custos portuários, que o Governo atual parece disposto a atacar, é parte integrante do problema, porque matou a navegação de cabotagem e lesa gravemente a indústria de construção naval pela retração das encomendas nesse ramo.

Situação do Mercado Internacional

Toda indústria de bens de capital, em qualquer país do mundo, tem necessariamente que poder atuar tanto no mercado internacional quanto no nacional, de modo a poder compensar as variações, cíclicas ou ocasionais, do mercado interno buscando saídas no mercado externo. Foi assim que a indústria automobilística brasileira sobreviveu a vários anos de crise exportando maciçamente.

É exatamente a situação com que nos deparamos hoje. Vejamos, portanto, quais as possibilidades atuais do mercado internacional.

Pois bem, as possibilidades que hoje ali se oferecem são excepcionalmente favoráveis; diria mesmo, incrivelmente favoráveis para um país como o Brasil, que dispõe de todos os elementos para aproveitar-se do que vai ser uma "década bendita", a dos anos noventa. Senão, vejamos.

Os anos coincidentes com os dois "choques do petróleo", ou imediatamente subseqüente a estes, marcaram um divisor de águas no comércio marítimo internacional, assinalando um súbito desmoronamento da demanda de espaço de carga, e conseqüentemente um desabamento das taxas de frete e do faturamento dos armadores. O resultado final foi um longo congelamento das encomendas de navios. O ano de 1975, após o pique em 1973 da conjuntura favorável, viu uma primeira retração, recuperada em 1977 para atingir um volume de comércio marítimo mundial de mais de dez bilhões de *toneladas-milha*: de 1978 em diante, porém, foi a queda vertiginosa para *quatro bilhões apenas* em 1985.

As razões eram óbvias: a produção de petróleo no Oriente Médio, fator determinante em todo o quadro, caiu de mais de um bilhão de toneladas/ano em 1978 para pouco mais de 500 milhões, a metade, em 1985.

Em conseqüência, as encomendas de navios-tanques também cairam verticalmente; no ano de 1975 haviam sido entregues, só de NT de mais de 100.000 TDW cada, quase 6 milhões de toneladas: as entregas dessa classe de navios cairam praticamente a ZERO em 1981. Em total, contando navios desde 10.000 até 200.000 TDW, as entregas haviam sido em 1975 de *13 milhões de toneladas*, que cairam a três milhões em 1984.

O mesmo não se dava, por motivo também óbvio, para os graneleiros, que em 1982 a 1984 acusavam ainda entregas substanciais; mas atingidos por sua vez pela recessão da economia mundial, despencaram em 1988 para entregas irrisórias, da ordem de 2 milhões de TDW, desde os 12 a 14 milhões dos tempos amenos.

Ou seja, durante mais de uma década foi violenta a retração dos armadores, abstendo-se de passar encomendas e acumulando vastíssima tonelagem ociosa. Navios, porém, não são sacas de café: a tonelagem estocada não exerce pressão estatística indefinida sobre o mercado. Passando os anos, a "frota fantasma", a *"mothball fleet"* paralisada nos portos foi-se diluindo, sucateada tanto mais rapidamente quanto o valor da sucata subia. Os armadores, evidentemente, não haviam "encostado" os seus

melhores navios, nem tinham interesse em manter longamente em inventário essa espécie de "estoques". Já em 1978, ainda no início da crise, eram sucateadas dez milhões de toneladas de navios; em 1985 essa cifra chegou a *22 milhões de toneladas* – o dobro de toda a frota mercante brasileira atual. Desde 1975 até hoje foram sucateadas perto de *200 milhões de toneladas de navios*: a "frota fantasma" desapareceu, os armadores estão precisando urgentemente de navios para atender a um comércio marítimo mundial dia a dia recuperado em sua pujança.

Acrescente-se a isso que, durante todos aqueles anos de "vacas magras", os navios que continuaram em serviço envelheceram: o "Lloyd's Register" assinala que hoje sulcam os mares nada menos de 23.000 petroleiros beirando os 20 anos de idade. Vinte anos é uma linda idade para uma moça bonita; é a força da juventude para um elefante; para um navio mercante e a senectude.

Nesse intervalo de encomendas escassas, não só os navios envelheceram, mas até mesmo navios relativamente novos tornaram-se obsoletos ou obsolescentes pelo progresso, esse não interrompido, das técnicas de construção naval e das necessidades do comércio marítimo. A elevação do preço do combustível revolucionou as exigências da propulsão naval. Ao tempo do diesel barato o custo do combustível não tinha prioridade sobre a consideração da velocidade, a fim de acelerar a rotação dos navios entre portos. Com os novos preços do petróleo, tornou-se imperativo projetar e construir navios *econômicos*, capazes de usar combustível de baixo tipo, e em menores quantidades.

Ao contrário, o que é premente hoje é encurtar o tempo de permanência nos portos. De onde a avidez da demanda por navios *novos* incorporando aperfeiçoados métodos de carga e descarga: graneleiros líquidos *"self-unloading"*, porta-contentores automatizados e computadorizados, transportadores de veículos *"roll-on/roll-off"*, e muitos outros tipos.

A esses fatores que vão gerar urgente demanda de navios novos acrescenta-se agora outro, de suma importância e vastas repercussões: a crescente consciência internacional da necessidade da preservação do meio-ambiente marítimo. O célebre sinistro do NT *"Exxon Valdez"* nas costas do Alaska acendeu um rastilho de agudas preocupações que se refletiram na nova legislação norte-americana, proibindo o acesso a portos dos Estados Unidos, ou mesmo o trânsito por águas daquele país, *de petroleiros que não sejam providos de casco duplo*. Essa medida já levou a CHEVRON OIL a modificar o perfil original de suas encomendas ao nosso Estaleiro: dos seis navios que estamos construíndo para sua frota, os três últimos já terão casco duplo.

Esse exemplo será certamente seguido por outros países, o que obrigará fatalmente as frotas petroleiras mundiais a substituir por navios de casco duplo os seus navios de casco simples – isto é, a quase totalidade deles. Imagine-se a demanda que isso vai gerar! Esse e outros fatores levam a crer que a demanda total, até o ano 2000, poderá atingir 45 a 50 milhões de toneladas anuais, em patamar estável. O Brasil, desde este momento, e sem nenhum investimento suplementar de vulto, pode facilmente concorrer com dois milhões de toneladas anuais.

Tudo isso junto – idade, economicidade de combustível, eficiência e potência nas fainas de carga e descargas, e, *last but not least*, redução do número de tripulantes graças à automação dos sistemas de bordo, a começar pela praça de máquinas – tudo isso significa uma formidável, urgente demanda por navios novos no mercado mundial. Recapitulemos um pouco: nos "anos santos" de 1975 e 1976, foram construídas, em cada um desses anos, *mais de trinta e dois milhões toneladas de navios: sessenta e cinco milhões de toneladas em dois anos*, considerando apenas embarcações de mais de 10.000 toneladas. Em 1980 a cifra anual havia caído para onze milhões, e o longo jejum continuou até 1988.

As projeções mais conservadoras, baseadas em duas hipóteses pessimistas, das quais uma fixa o limite de vida útil do navio mercante, na média de todos os tipos, em 24 anos, e a outra em 26, permitem calcular uma demanda *constantemente crescente* a partir do corrente ano até o ano 2000, ano no qual a demanda na primeira hipótese será de perto de 25 milhões de toneladas, e na segunda de 20; projeção baseada, note-se bem, apenas na *idade* dos navios, e não na obsolescência funcional de parte da frota.

E quem vai suprir essa formidável demanda mundial?

Acontece que nos dez anos de virtual paralização do processo de renovação da frota, surgiram novas e nítidas tendências evolutivas na estrutura setorial dos países industrializados. Cada vez mais afirmou-se a tendência, nos países post-industrializados, de evoluir para a concentração de seus esforços nas áreas de alta tecnologia, abandonando deliberadamente áreas industriais pesadas, que em outras eras haviam sido os carros-chefes do processo de industrialização. Mais e mais, tenderam a deslocar-se para os países ditos "de nova industrialização", os *"N.I.C's"*, as indústrias pesadas, intensivas em material e mão de obra. Isso é verdade até mesmo na indústria automobilística, por tanto tempo associada com a própria noção de "progresso". O Brasil, e dez outros países, hoje fabricam motores e outros componentes, que serão simplesmente montados nos Estados Unidos da América. Nos Estados Unidos da América, as indústrias siderúrgicas de Pittsburg perdem significado em favor de Silicon Valley e de seus micro-chips. Com mais forte razão ainda, o fenômeno atinge a indústria de construção naval nos países mais desenvolvidos. Os estaleiros tradicionais da França, da Grã-Bretanha, da Holanda, e do próprio Japão, encontram dificuldade em recrutar mão-de-obra: os jovens operários desses países não querem trabalhar em um serviço duro, que exige grande esforço físico, onde estão expostos às intempéries, faça chuva, sol ou neve, frio ou calor, onde a graxa suja as mãos e as roupas: querem trabalhar em ambientes climatizados, de avental branco, observando quadros eletrônicos de comando. Os velhos operários não se adaptam facilmente a novas técnicas de alta produtividade.

Resultado: fecharam-se estaleiros nos grandes países industrializados, de antiga tradição no ramo. Seus acionistas voltam-se para as indústrias de ponta – informática, robótica, aeronáutica, eletrônica. Ficam vivos apenas os centros de projetos, que podem ser utilizados para "inseminar artificialmente" unidades de produção em terceiros países. Há vinte anos atrás, ambas as margens do rio Clyde, do rio Tyne, eram totalmente ocupados por estaleiros diversos. Hoje, poucos restam.

No próprio Japão, ainda o maior fornecedor mundial de navios, não está sendo reativada a capacidade que fôra reduzida por ociosa nos anos de crise. *No mundo altamente desenvolvido, as consultas de armadores excedem a capacidade dos estaleiros*, cujas datas de entrega já recuam para a segunda metade da década.

Por outra parte, os grandes armadores, de países sérios, hesitam em confiar encomendas a estaleiros em países como por exemplo os da Europa Oriental, onde o progresso técnico estagnou ou engatinhou durante décadas de descalabro empresarial sob regime comunista, onde a confiabilidade é mediocre quanto a qualidade e prazos de entrega.

Há, decerto, os estaleiros do Oriente, dos "pequenos tigres asiáticos", mas justamente por sua alta qualidade, esses estaleiros estão, como os do Japão, com suas carteiras de encomendas abarrotadas, congestionadas. A Coréia, por longo tempo segundo produtor mundial, tornou-se área de alto risco, a braços com violenta instabilidade política e sindical.

O que resta? Resta, em particular e em primeiro lugar, o Brasil, com sua vasta capacidade, sua longa experiência do ramo, sua excelente qualidade de produção, inteiramente a nível do estado-da-arte internacional, suas grandes reservas de mão-de-obra abundante, já suficientemente capaz, e suscetível de rápida reciclagem e adestramento avançado. A prova disso está em nossa própria cada onde estamos construindo para exportação uma série de seis grandes petroleiros, três de 150.000 TDW e três de 130.000 de casco duplo, para uma das mais importantes frotas de petroleiros do mundo, com tanta satisfação para o cliente que este, após a entrega do primeiro navio, fez questão de doar uma importante quantia à Fundação ISHIBRAS, que dá assistência social aos nossos operários.

Não só nós da ISHIBRAS, mas todos os estaleiros???. Somos o único país do hemisfério que tem infra-estrutura para construção de navios de grande porte. Na verdade, se o Brasil perder a oportunidade de ouro que lhe é oferecida nesta "década jubilar" do fim do século, poderá candidatar-se ao Prêmio Nobel da burrice.

Aproveitar o Presente, Preparar o Futuro

O que é necessário para aproveitar a favorável conjuntura presente, e garantir no futuro a estabilidade da indústria brasileira de construção naval? Essencialmente, é necessária uma política coerente, permanente e inteligente, tendente por um lado a alavancar exportações, e por outro lado a estimular construções para o mercado interno.

A exportação de navios requer, em qualquer país do mundo, certas facilidades correspondentes às características especiais do produto. Exportar um navio não é o mesmo que exportar um par de sapatos ou uma geladeira. O navio é um bem de capital de longo ciclo de produção, cuja fabricação necessita, ao longo desse espeço de tempo, de financiamento por esse mesmo prazo. Aqui como na China, ou na Holanda. Não há estaleiro no mudo que possa financiar sua produção com capital próprio. Se pudesse fazê-lo, poderia trabalhar como banco, e não como estaleiro, emprestando dinheiro à praça com altos lucros em vez de enfrentar os baixos e aleatórios lucros característicos do setor.

Nossos navios, de construção nacional, são plenamente competitivos em qualidade com os de qualquer outro país. Precisam, porém ser competitivos também em preço e em condições de financiamento. Países há que recorrem a subsídios diretos, em dinheiro, aos seus estaleiros. Para nós bastaria um financiamento à produção e um financiamento à exportação que nos coloquem em posição comparável às que existem em outros países.

Estamos falando de *empréstimos*, que têm retorno, mas em condições de prazo e juros a nível internacional; não de verbas do Tesouro.

Precisamos também de que os processos para o acesso aos fundos de financiamento sejam ÁGEIS: no Brasil decorrem dois anos desde a solicitação do empréstimo até assinatura do contrato de financiamento à produção. Normalmente em outros países são seis meses apenas. O cliente estrangeiro nem sempre tem a paciência de esperar dois anos até saber se o estaleiro que escolheu terá ou não recursos para financiar a obra.

Precisamos ainda renunciar à glória de sermos o **ÚNICO PAÍS DO MUNDO QUE EXPORTA IMPOSTOS** – onerando com eles mercadorias tais como os navios, que sofrem assim grave perda de competitividade. Urge acabar com essa sandice; e não só para os navios destinados à exportação: *os navios dos armadores nacionais são obrigados a competir no mercado internacional de fretes*: devem, pois, ter tratamento fiscal idêntico ao dos exportados.

A propósito de armadores nacionais, cabe aqui consignar um voto de louvor e de gratidão aos grandes armadores estatais, especialmente a PETROBRAS, mas também a CVRD e, enquanto pôde, o próprio Lloyd Brasileiro, que nos tempos mais difíceis foram fiéis ao propósito de modernizar as respectivas frotas apoiando em toda a medida do possível a construção naval brasileira.

Todas os países do mundo identificam e apoiam aquelas indústrias que reconhecem como de relevante importância para a independência econômica e para o progresso da Nação. O Brasil assim identificou, por exemplo, indústria aeronáutica; mas, em comparação com essa "irmã celeste" tratada, e com muita razão, como uma "Princesa industrial", a construção naval continua na condição de "Gata Borralheira". A "irmã celeste" pode importar os seus insumos de onde quer que os encontre a melhor preço, com alíquota zero, totalmente isenta das servidões do "similar nacional" ou das estreitas quotas de "drawback". Mais do que isso, o Governo compreende, no seu caso, a fundamental importância de assegurar-lhe escala econômica de produção, e joga todo o seu peso na balança das transações nacionais e internacionais para garantir que, assentada em economia de escala, a indústria aeronáutica possa cotar preços unitários competitivos. Tudo isso muito certo; mas a construção naval, pelo menos tão importante quanto a aeronáutica em termos de objetivos nacionais, ainda não foi encontrada por nenhum Príncipe Encantado, protegida por nenhuma boa fada. Seja-me permitido citar aqui algumas frases do discurso que tive a honra de pronunciar em presença do Excelentíssimo Senhor Presidente da República, no dia 27 de maio último:

"Não são muitas as indústrias no Brasil e no mundo, que com a exportação de apenas seis unidades de sua produção podem carrear cerca de quatrocentos milhões de dólares para fortalecer a posição da balança comercial do país.

A indústria de construção naval é fator do poder marítimo nacional, por sua vez fator de segurança e de independência. Essa independência não está devidamente assegurada quando, de nosso comércio marítimo que representa 95% de nosso comércio exterior, menos de 15% das cargas são cobertas pelo pavilhão nacional".

Papel da Marinha de Guerra no Estímulo à Indústria Naval

Não seria completa esta exposição se não abordassemos a importantíssima inter-relação entre a indústria de construção naval e a Marinha de Guerra.

Em todos os países onde há construção naval desenvolvida, a Marinha de Guerra sempre foi, historicamente, um esteio considerável da atividade da indústria, com benefício mútuo na aquisição e desenvolvimento de experiência. Uma política orçamentária que considere os gastos com a Marinha de Guerra como uma carga de custos sem proveito é uma política singularmente míope, necessitando de lentes de contato _ls<0> com a realidade. As encomendas de meios flutuantes para a Marinha de Guerra geram receitas para o Tesouro através da tributação arrecadada dos estaleiros e dos seus fornecedores, da tributação direta que o Estado cobra sobre a renda dos acionistas e funcionários, e da indireta que incide sobre o consumo das dezenas de milhares de pessoas remuneradas pelas mesmas indústrias. Pensamos, também, nos enormes prejuízos que a Marinha, com meios adequados, pode evitar pela repressão ao contrabando, que sonega receita ao Tesouro, e à pesca predatória que destrói preciosos recursos do mar. Quantos prejuízos poderia evitar a ação de navios patrulheiros oceânicos com que sonhamos!

Em conclusão: nenhuma Nação conseguiu, ao longo de toda a História mundial, ter expressão no comércio marítimo internacional sem uma grande frota mercante e sem construção naval própria, e sem um Poder Naval capaz de apoiar e defender eficazmente os seus interesses marítimos, na paz e na guerra.

Oxalá possa o Brasil retomar, em um futuro muito próximo, o **"RUMO AO MAR"** que em uma década de gloriosa memória, foi o próprio lema da Marinha de Guerra!

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AFRICA AND THE WORLD: AFRICA ON ITS OWN*

Philip Ndegwa

Introduction

The decision that the 20th World Conference of SID should address, as one of its main themes, "the risks of involuntary delinking of poor countries ... from dynamic elements of the world economy" was, as recent events and trends have demonstrated, both far-sighted and timely. In the case of Africa, especially Sub-Saharan Africa which is the main focus of this paper, there is no doubt whatsoever that the process of marginalisation of its countries in the world economy is now active and proceeding apace'. In terms of what SID stands for, this marginalisation process is negative, unfortunate and not in the interest of the international community. Those analysts who believe that the increasing international interdependence should be managed for the benefit of all nations have been alarmed by the process and called for its reversal. Passionate appeals by African countries have been made, and several U.N. General Assembly Resolutions passed asking the international community to take measures to deal with the African economic and social crisis. In addition IMF and World Bank prescriptions have been applied, and the majority of African countries have been carrying out what are referred to as "structural adjustment programmes". Yet the process continues relentlessly and on certain assumptions seems set to accelerate during the 1990s.

This process of marginalisation must not be seen in academic terms – as a kind of natural and harmless gradual reduction of contacts between African economies and the rest of the world. What the process actually involves is deepening poverty of already very poor people, widespread unemployment, political instability and other economic and social hardships in these countries. In addition to this situation, there is now a crisis of confidence in the continent in the closely related areas of economic and political management. Doubts are spreading and deepening about the effectiveness of existing economic policies and programmes, including those sponsored by the two Bretton Woods institutions, because they are not bearing fruit in spite of the real sacrifices being made.

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* Paper prepared for the 20th sid World Conference, 6-9 May 1991, Amsterdam.

And this has generated growing doubts about the political systems being practised. In that connection the spreading call for political multi-partyism has more of its roots in the economic and social crisis facing African countries than ideological convictions on how democracy should be practised. This crisis of confidence is made worse by the fact that given the realities facing these countries there are no obvious or readily available solutions: and certainly there are no easy or short-cut solutions. For many countries there appears to be no light at the end of the tunnel; in fact the tunnel appears to be rapidly darkening. This situation demands a very clear and objective understanding of the internal and external forces at work on the part of the people and their leaders, and courage to embark upon new and in some cases more politically demanding programmes.

This paper does not discuss the magnitude, characteristics and consequences of this marginalisation process in detail. Its main purpose is to suggest how African countries should, given all the realities facing them, respond to the situation. In thinking about this a major assumption is made that the lack of political will at the international level to act meaningfully on the critical problems facing African countries will continue for some time. I consider that assumption to be realistic: and one of its main implications is that there must be a decisive, well planned and sustained collective political action by the African countries themselves in working together and in dealing with the rest of the world.

Africa Today

Africa is the second largest continent, after Asia, of the inhabited continents. Unhappily for the author and I believe others with Africa's interests at heart, it has also the largest number of countries in any continent – 51[2], a number which could increase if more powerful secessionist movements in some countries were to succeed[3]. In fact Africa provides nearly one third of all the Members of the United Nations Organization. In terms of natural resources the continent, in spite of the Sahara and the Kalahari deserts and large areas of arid or semi-arid lands in some countries, is well endowed for its development requirements. For examples, Africa has oil; valuable and strategically important mineral resources; some of the largest rivers in the world with tremendous hydro-electric power potential amongst other feasible benefits; valuable tropical forests; tremendous potential for production of a wide range of food items, including animal products; many natural attractions of immense tourist value, including the largest and most varied wealth of the world's remaining wildlife resources; etc.

But in spite of these resources, for more than fifteen years now, and for some countries much longer than that, almost every item of development news from Africa has been disturbing, and increasingly so. Africa's history is these years has been that of human and natural tragedies, and deepening failures in economic, social and political management. Thanks to detailed studies on the African situation carried out in recent years especially by the World Bank and the Economic Commission for Africa much is now known about Africa's increasing poverty, population problems, its fragile natural environment, its weak and alarmingly externally dependent economy, weaknesses in management and governance, etc. While this paper will not discuss those depressing aspects in detail, the situation must be recognised as extremely serious and dangerous. The intellectual and practical challenge is how to overcome it.

But before offering some suggestions in that direction, a few words on some of the broad problems facing Africa are in order. One major and man-made tragedy in post-independent Africa has been that of civil wars, violent coups d'etats, armed conflicts and social upheavals in many countries and which now continue with ferocity in Sudan, Somalia, Ethiopia, Mozambique, Angola, Uganda, Rwanda and Liberia. In the process there has been a considerable and deplorable loss of life; the creation of the largest population of refugees in any continent and which, at more than 5 million, is larger than the population of 22 African countries[4]; such serious economic disruption that in many of these countries poverty is greater now than at the time of independence, while physical and social infrastructural facilities have virtually disintegrated; increased military expenditures in the countries concerned and in the neighboring ones; and heightened suspicions amongst the people within the countries concerned and often between those countries and their neighbours. The costs of these hostilities are therefore incalculable, and stablishment of peace is one of the vital necessary conditions for economic recovery and growth.

Since independence Africa has also suffered severely from natural calamities, especially the widespread and prolonged drought in many parts of the continent during 1968-73 and the early 1980s, and which appears to be emerging again in some countries. The resultant famines led to deaths of many (at least one million each for Ethiopia and Sudan) and stunted growth of millions of children – which means that the long-term consequences of those famines will be serious for years to come. The impact of the drought was aggravated by economic mismanagement, especially in agriculture, with the result that food production per capita in many African countries has been continuously declining for at least a decade and a half. The food situation is actually one of the most woolying problems[5] – what with the steadily rising populations; chronic shortages of foreign exchange for commercial imports of food; uncertainties surrounding food aid in the years ahead; severe shortages of investible funds to promote food production; likelihood of drought in the early 1990s; etc. During the 1990s, and may be even during the first decade of the next century unless requisite efforts are made, Africa, which already imports more than one third of its grain requirements, will not be able to feed itself. There are many and obviously very disturbing implications of that reality.

Poor economic performance has not been confined to agriculture; it has covered other major economic sectors and has been so serious that in some countries there appears to be an almost total collapse of the economy. Africa not only has the largest number of the least developed countries, but that number itself is increasing and now stands at 29. And as a recent report by the Economic Commission for Africa states there are many countries "knocking at the door". Although in many cases internal factors are the ones mainly responsible for this poor performance external ones have also played their part; and as this paper stresses African countries should take the hostile external environment as given in designing their economic and political strategies for the 1990s and beyond.

One external factor which needs some highlighting because of its severely debilitating impact on African countries – both economically and politically – is these countries external debt. Africa's external debt has continued to increase in spite of the so-called 'debt plans' and minor debt relief measures by some bilateral creditors. The total debt,

now estimated to be about US$ 270 billion for Africa as a whole, sounds modest compared with the total external indebtedness of Latin America. For the individual African countries the figures are, indeed, very modest. However when this debt is seen in terms of debt service ratios, which range from about 35% to 60% and in some countries much higher, or in terms of debt/GDP rations, the very heavy burden of the debt becomes obvious. It can be stated without any fear of contradiction that African countries, because of their pronounced economic weakness and the fact that they are so greatly dependent on imports for consumption and development, will not achieve economic recovery unless this crushing debt burden is removed[6]. That is the plain truth. On the other hand there is the reality that no satisfactory solution to this debt appears in sight – not because of the magnitude of the debt but because of lack of political willingness on the part of the creditors to take the necessary action. In that connection, it is also now abundantly clear that this debt is being used by some creditors to "control" African countries politically and economically. In fact neo-colonialist practices are now no longer being disguised, and the debt appears to be a very handy mechanism for that purpose.

In describing the situation in Africa today it should be recognised that African countries are still very young nations – most of them having achieved their political independence only 30 or so, years ago. As history has shown, it takes generations to establish long lasting traditions and effective social, economic and political institutions for the management of a country and its economy in a stable manner. With that in mind one feels rather disappointed to see African countries being condemned, especially in the area of political management systems, on the basis of traditions which have been developed elsewhere after centuries of experiences, and without taking into account the colonial inheritance of these countries at independence – especially a dictatorial, discriminating and exploitative system of government; sharply divided ethnic groups; little or no education for the majority of the people; virtually no trained African administrators; etc. In fact when these realities are taken into account and appropriate weight given to external factors, the performance of some African countries in decolonising and holding their countries together has been a major achievement. However the main point is that these countries are still very young and therefore have yet to establish firmly those basic institutions and systems necessary for stable management of a nation – e.g. a competent public service and judicial system; a politically mature population in which ethnic backgrounds are not important in political and economic matters; a framework of social infrastructures which encourage one to think in national terms; an economy in which the indigenous population plays the prominent part; etc. In other words political independence did not establish "nations" as such; what it provided was the right and opportunity of the people of the country concerned to build their "nation". African countries have therefore been absolutely right in saying that their aim is nation building, not just economic development.

However, it should be quickly added that the unsuitable and difficult colonial inheritance, and the fact that these countries are very young, should not be used to condone deplorable policy failures and unacceptable practices which have plagued many countries since independence. In particular misgovernment and maintenance of politically repressive and corrupt regimes should be condemned without hesitation. It needs to be

stressed again that, other things being equal, there is a direct linkage between economic performance and political management systems and practices. In that connection it is significant that the few African countries which have achieved relatively better economic performance since independence have been those which have had reasonably democratic and open management systems and in which reliance on people in the production process was promoted. The prevailing economic and social pressures should not therefore be used to suppress democratic aspirations or to perpetuate economic policies which have clearly failed in the past, for example reliance on the public sector instead of the people in development programmes.

Africa and the World

The process of Africa's marginalisation has been strengthened in recent years by the political and economic restructuring exercises in Eastern Europe. Whether one is thinking about foreign direct investment, food aid or commercial credits the attention given to Africa by the developed countries has been rapidly dwindling. Moreover even for multi-lateral organizations there is reduced attention in terms of real support in spite of high-level statements. In that connection and given African countries economic circumstances, it is unbelievable that IMF continues to siphon off financial resources from Africa, which in the last seven years has amounted to more than $ 4 billion. The heavy service burden on World Bank debt is also a matter of great concern. However, the point is that external attention to Africa has substantially declined; in fact it would not be an exaggeration to say that these countries are now virtually ignored. Here it is worth quoting an article in a recent issue of The Economist[7]:

"With cold-war interests gone, it is tempting to forget Africa. Eastern Europe, and still useful clients such as Egypt, are also clamouring for aid; recession in the rich world makes generosity harder. Besides, aid to black Africa has a depressing record. In the 1980s the region swallowed more than $100 billion of it and defiantly got poorer. (I consider this to be a very unbalanced and inaccurate statement) Perhaps money for Eastern Europe would be money better spent.

In fact most arguments for aid to Africa sound stronger when made for Eastern Europe. The West has an interest in fostering vigorous economies with which to trade, rather than feeble ones that disgorge refugees. It wants as many governments as possible to care for the environment. It hopes that its largesse will discourage poor countries from resenting its riches and – who knows? – from sprouting more Saddams. All these aims are more likely to be achieved in Eastern Europe than in Africa. And geography reinforces the point: Germany is a border's width away from Poland, a hemisphere away from most of black Africa.

Yet Africa has a claim that is all its own. It is the world's poorest and most wretched continent. If it were not for the Gulf war, television screens would now be showing emaciated Africans, who are starving in even greater numbers this year than they did in 1985. Hollow eyes and matchstick limbs tug on comfortable people's consciences. The rich world would be less than human if it ignored the starving, so it had better be in business of making starvation less common."

These paragraphs indicate the unbalanced and unkindly impatient way in which Africa is now viewed in the West. What are the implications? Should African countries depend on the kind of discomfort to the conscience in the rich countries which The Economist sees as the only reason for giving some attention to Africa? Clearly not. Moreover it should be pointed out that according to The Economist the objective in assisting Africa should be limited to "marking starvation less common", and not the development of African countries and their peoples, or wide international objectives e.g. in the field of environment[8]. This reminds one of some of the classical arguments that wages should be kept at subsistence level in order to ensure supply of labour.

Historically relations between Africa and the rest of the world have never really been equitable. Slave trade, which contributed greatly to the economic retardation of many parts of Africa, was followed by colonization, of almost all of Africa, which flourished on the basis of exploitation of the African people and African natural resources for the benefit of settlers and metropolitan powers. As already mentioned colonial occupation was characterized by many negative aspects: in addition to severe economic exploitation there was suppression of human development of the indigenous people; deliberate division of the African people – through the use of "divide and rule" strategies – as an instrument for perpetuating colonial rule (and which has been largely responsible for the subsequent internal armed hostilities in many African countries); destruction of African cultures; partition of Africa in an arbitrary fashion – which is responsible for the large number of African countries and border conflicts in some parts of the continent; dictatorial rule and suppression of democratic aspirations; etc. Another important historical factor is that achievement of political independence was in many cases after very bitter struggles, in some cases pretty bloody ones. This colonial inheritance should not be forgotten in studying the process of economic and political developments in Africa since independence. In fact and although this is not the place to go into this subject in great detail, it can be said that that colonial inheritance is partly responsible for the caos and problems now prevailing in some African countries.

African countries must accept that interest in them by the developed countries is rapidly declining – certainly in terms of foreign assistance, foreign direct investment, political significance, etc. This reality, incidentally, means that in the 1990s these countries will become even more dependent on the World Bank in their development struggles – another reality with major implications of its own in many areas including the working relations between these countries and that institution[9]. In formulating their future strategies African countries must recognize the necessity of collective action for collective self-reliance. This will be discussed presently. Secondly they must recognize that self-interest is the dominant factor in determining relations between countries, and not the noble ideals of internationalism always declared at international gatherings. Further, it has always been clear that the relative strength of the countries involved plays a most significant role in determining those relations. And with such considerations in mind it should be stressed that African countries are not as weak as they think if they would act together. This can be illustrated by one example. In the last two decades or so much has been discussed about oil, with the emphasis being on the Middle-East producers. However, as one analyst has indicated, the United States for one is very dependent on oil imports from Africa. He says:

"In fact, (in 1990) the United States imported more oil from Nigeria and Angola than it did from Iraq and Kuwait. Nigeria, which sells the United States 899,000 barrels per day is the fourth leading supplier of oil to this country, significantly ahead of our neighbor Mexico which provided 742,000 b.p.d." The article continues: "Clearly, Africa is as significant as the Middle East, yet little attention is devoted to Africa's importance. With the ongoing crisis in the Gulf, Africa has increased its US shipments, which means that any disruption of oil deliveries from the continent, particularly Nigeria, and the US faces calamitous economic disaster[10]."

Other examples exist of fairly significant bargaining strength, including availability of strategically important minerals and even markets for some developed countries. It is important that African countries urgently identify such areas of strength and make maximum use of them in their interactions with other countries, especially the developed nations. As already mentioned, in the past Africa's strategy in such interactions has concentrated on pleading for implementation of equitable international reforms and sympathetic understanding of Africa's problems. That is the clear strategy in Africa's Submission to the Special Session of the U.N. General Assembly on Africa's Economic and Social Crisis[11]. In that document African countries placed great expectation on external understanding and implementation of supportive measures by the international community. They even suggested sharing the responsibility of planning their countries development with the donors. But this strategy has clearly failed; and while Africa and other developing regions should continue fighting for a more equitable international economic order, internal policies should not be based on early realization of such an order.

Collective Self-reliance for Economic Recovery and Growth

Experiences since independence show that African countries must not rely on other countries or the international community in solving their economic and social problems. Nor should they expect that "history" or "time" will somehow find a solution to their problems. In other words only they themselves can work their "salvation" – through taking the necessary measures. In preparing to take the necessary action African countries should also recognize the limitations of the structural adjustment programmes which many of them have embarked upon with the assistance, or better still, at the insistence of the World Bank and IMF. Space does not permit a detailed discussion of this important point[12]. But briefly these programmes, with their concentration on "getting the prices right" and establishment of macro-economic balances, do not provide a sufficient condition for economic recovery and growth. This is because, in addition to other considerations, increased production of goods and services must be central to any programme for economic recovery. And that requires, in addition to getting prices right, investment capital, restoration of import levels, rehabilitation and expansion of infrastructural facilities, removal of tariff and non-tariff barriers to exports, etc.

If this argument is accepted and cognizance taken of the existing realities (e.g. foreign direct investment flow to Africa is already negative and is unlikely to be significant in the immediate years ahead; foreign aid to rehabilitate and expand infrastructural facilities is unavailable; Africa's export markets are unlikely to be derestricted and assume buoyancy;

etc.) then it becomes clear that the only source for economic recovery and growth for these countries is economic cooperation on the widest scale possible to promote intra-Africa trade, benefit from coordinated development of their infrastructural facilities, increase their strength in bargaining with third parties, etc.

African countries would not be alone in following that collective strategy. In fact in recent years there has been an active process of trade and economic "blocalisation' in the world economy, of which the drive for "Europe 1992" and the US-Canada Trade Agreement are prominent examples. In my view economic blocalisation is a second best approach for dealing with the economic problems of the individual countries concerned and the world as a whole: a more efficient strategy would be an equitable international economic programme in which the short-run and long-run needs of all countries are taken into account. However, given present realities at the international level and other circumstances, African countries must recognize that their hope lies in collective action. They should recognize, for example, that the principal objective of "Europe 1992" is to promote the economic and political interests of the countries concerned, and not the often declared international objectives and ideals. "Europe 1992" is expected to maximise economic growth from internal opportunities available and those created by closer integration; and to enhance the political and economic strength of the European Community in dealing with other countries. If the developed countries of Europe and the truly industrialized and rich US and Canada recognize the importance of cooperating with each other in the present world economy, African countries should recognize that their need for cooperation is much more compelling and urgent. They must therefore be less starry-eyed about the stated international objectives and ideals, and also their national sovereignty narrowly defined on a single country basis. With regard to the latter the Economic Community example shows that some surrender of the so-called national sovereignty in certain areas to the collective group is necessary for achievement of basic national objectives, especially enhanced economic welfare and greater political influence. African countries should accept that collective sovereignty is the best safeguard for individual country's sovereignty.

Actually economic cooperation amongst African countries has been discussed ever since these countries independence. But so far the history of economic cooperation in the continent has been that of failure, with a few intermittent achievements in some cases. The causes of this sad history are many, and include lack of firm and sustained political commitment; severe external economic shocks which instead of strengthening the resolve to stronger cooperation have led to disintegration of existing cooperation arrangements; reliance of many of these countries on economic ties with the former metropolitan powers or major sources of foreign assistance; political and armed hostilities in some countries; and faulty or misguided technical formulation of cooperation arrangements – especially use of classical models while the African situation calls for more imaginative approaches[13].

But in spite of past failures collective self-reliance must now move rapidly from the levels of rhetoric and half-hearted political attention and commitment to the centre of the stage. In its important 1989 Report on Sub-Saharan Africa the World Bank appeared to have been so overwhelmed by past failures in this field that it could only recommend "an incremental approach" to cooperation in Africa[14]. But since there is no other sure source of growth for

Africa, cooperation requires to be pursued urgently, vigorously, comprehensively and imaginatively. In particular "production sharing" approaches must be an integral aspect of such cooperation[15]. Here one is not thinking only or even primarily about manufacturing activities. Indeed production sharing is even easier to organize in agricultural production. African countries rely on imports for about one-third of their grain requirements (and the figure would be higher if per capita calories intake per day were not so low); they are importing increasing quantities of vegetable oils, meat and dairy products, etc. Yet production of these food items in Africa is feasible given production sharing and measures to facilitate exchange of products. African countries should not listen to those economists who argue about the costs of "trade diversion". Why should the African countries be the only ones to practise "pure economics" – even assuming that that static classical welfare economics argument is correct? Why does the European Community ignore that argument? And, generalizing the argument, why should the European Community spend about $50 billion and $85 billion a year to subsidize their farmers through the budget and indirectly through higher consumer prices respectively? The level of subsidies in the US is also very high – about $47 billion and $28 billion respectively in 1990. There is ample and increasing evidence that this is not the time for any one country, especially a developing one, to practise market economic theories in the area of foreign trade in unmodified fashion on its own.

Conclusion

This paper has recommended that African countries response to the marginalisation process affecting them should be carried out through the overall strategy of collective self-reliance involving political and economic cooperation. Through that strategy these countries will be able to establish better conditions for the effectiveness of their economic efforts, and increase their strength in negotiations with other countries. Such collective self-reliance requires a carefully planned programme of some deliberate delinkage from the rest of the world: for example in the economic area it requires that strong efforts be made to promote intra-African trade instead of relying so completely on present patterns of foreign trade which have hardly changed from those of pre-independence days; and in the area of foreign policy the strategy requires that each and every African country should spend more time in understanding other African countries and working with them in economic and political areas instead of concentrating virtually all diplomatic attention on non-African countries as is the case today. Some deliberate delinkage is therefore necessary to deal with the marginalisation process[16]. However complete delinkage from the rest of the world is, of course, impossible; nor would it be desirable. But the truth of the matter is that African countries will never achieve their rightful share in the operations of the international economy until they become stronger economically and politically. And that strength, in the present world, can only come from collective self-reliance.

In addition to that overall strategy, and firm commitment to appropriate general economic policies, African countries must recognize that urgent action is also desperately needed in certain critical areas. First and as already mentioned, establishment of peace is absolutely necessary. Second these countries must establish political conditions and general environment which would discourage brain-drain[17], flight of capital and disinvestment. The concept of an "Enabling Environment" must therefore be looked at in broad terms: it must, for example, include peaceful living conditions, good governance, elimination of corruption, etc. in addition to efficient infrastructural facilities and tax and other incentives. There is no

doubt that fiscal and such like incentives will not on their own achieve much unless general conditions as those indicated here also exist.

Thirdly and closely related to the point just discussed is the whole issue of people's commitment to the development of their countries. Although not much discussed in economic literature, nationalism and patriotism play a most important part in the development process of nations. This is an aspect of what has been referred to as the "social capability" for development. Japan is a good example of a country in which that element of "social capability" was of decisive importance in its industrialization process. African countries should therefore pay attention to this aspect of development and take the necessary measures to promote nationalism and patriotism. However and as already mentioned, many African countries are so small that nationalism and patriotism on a strictly country-by-country basis will not be very effective in promoting development. It is therefore recommended that African countries revive the spirit of Pan-Africanism which played such a significant role in their independence struggles. With this in mind it would not be an exaggeration to say that political management in Africa has as important a role to play as economic management if African countries are to achieve economic recovery and growth through the strategy of collective self-reliance.

Fourthly, African countries must act more decisively in the area of population planning. In time Africa as a whole can, of course, support a much larger population than the present one. However the high rate of population growth in the continent, and the fact that the bulk of the population is very young (those of 16 years or below accounting for nearly 60% of the population in most cases) mean that there is a serious population problem – in terms of food requirements; employment; provision of education, health and other basic needs; management of urban growth; pressures on the natural environment; etc. It cannot be stressed too strongly that the high rates of population growth in African countries are a major source of economic and social problems. African countries must therefore carry out the programmes necessary for reducing the rate of growth in their population. And rapid declines in rates of growth of population can be achieved as has been demonstrated by some countries of South East Asia. In this area African countries cannot blame external forces; it is within their ability and control to deal with the matter.

Fifthly, African countries must accelerate the implementation of those policy requirements and other measures which would promote people's participation in the development process. Past experiences, especially during the 1980s, indicate clearly that Public Sector participation in direct production of goods and services has been characterized by inefficiency (e.g. through over-employment for political pourposes, corrupt practices, inhibition of Private Sector investment, etc.). Further, use of national savings to bail out ailing parastatals or subsidize their operations has starved Private Sector of resources needed for their operations. Parastatal operations have also contributed substantially to the prevalence of nigh levels of budget deficits in these countries, which in turn lead to generalized and serious distortionary effects. It is therefore imperative that programmes of privatisation and divestiture be implemented with vigour but systematically – which means, among other things, overcoming many vested interests now against those programmes. It should also be added that carefully managed programmes of privatisation and divestiture could promote foreign direct investment, inflow of technology and management skills, and access to certain markets (e.g. in the tourist industry when foreign investors participate in national hotels).

SID and the Marginalisation Process

As stated at the very beginning of this paper the delinking or the marginalisation process now affecting Africa (and some countries of Latin America) is not a harmless or temporary phenomenon which can be ignored. The process involves increasing poverty, unemployment, environmental degradation, political instability and other severe economic and social hardships. It is also clear that the process will not change course on its own: its reversal demands appropriate action regionally and internationally. What should be the role of SID in all this?

In answering that question it should be observed that the marginalisation process is partly the result of blocalisation of the world economy characterized by pursuit of narrow bloc interests with fairly short or medium considerations uppermost. SID's objectives include achievement of "international development" through promotion of international dialogue, understanding and cooperation. Given the situation now prevailing in the world economy it appears necessary that SID should: (i) come out strongly against the marginalisation process; and (ii) step up its campaign for "educating" world leaders about the global dangers of the marginalisation process. With this in mind, it would be useful at this Conference to examine how SID's tactics and strategies could be strengthened for more effective promotion of that kind of education.

Obviously in discussing these matters it must be recognised that central to the whole issue of management of the global economy is exercise of political power at the international level. At the same time there is the reality that all the countries of the world are, very fundamentally, in the same boat. Therefore the strong nations should not see this as the opportunity for exercise of power and promotion of their interest at the expense of the others; rather what their powerful position provides is a real opportunity for exercising "responsibility" for the welfare of the present and future generations, and global peace and stability.

Notes

1. There are many indicators of this process. In the economic area the steady shrinkage of Africa's share in total world trade is perhaps the most descriptive of that process. Substantial and continued disinvestment by foreign investors is another indicator. Indicators in the political area are not so easily identified; but there is no doubt that in most Capitals of developed countries African issues are receiving less and less attention.

2. The large number of countries is unfortunate for many reasons, but two of the most important are (i) many of these countries are not, because of their very small size and narrowly based and highly vulnerable economies, economically viable; and (ii) the large number of countries makes reaching agreement on economic and political cooperation amongst them difficult – a problem made worse by the tremendous economic, financial and in some cases political dependence of many of these countries on their former colonial masters or bilateral donors.

3. Actually in spite of attempts in quite a number of countries since independence no secessionist movement has so far succeeded. However, looking into the future some cases e.g. Eritrea, Southern Sudan and the special one of Western Sahara might make history unless politically solved.

4. The problem of refugees in Africa has been aggravated by economic factors (e.g. people running away from economic hardships) and environmental pressures (e.g. people running away from encroaching deserts). But the most powerful factors have been political mismanagement and armed hostilities and rivalries.

5. It has been reported that the World Food Programme predicts that 27 million people in 25 African countries could starve to death in 1991 and many have already died. See Ann Clwyd, We know the facts but still nothing is being done for Africa, Guardian, 8 February 1991.

6. For a recent and clear statement on the African debt situation and the need for external funding see G.K. Helleiner, The IMF, The World Bank and Africa's Adjustment and External Debt Problems: An unofficial view, paper presented to the Symposium sponsored by the Association of African Central Banks and IMF on Structural Adjustment and External Debt and Growth in Africa, Gaborone, Botswana, February 25-27, 1991.

7. The Economist, 2nd February 1991, p. 17.

8. Space does not allow discussion of the important concept of "sustainable development". But, quite clearly, in the African context sustainable development should be centered on eradication of poverty. Poor people have no alternative but to cultivate on marginal lands, cut down trees for firewood, etc. Those committed to proper environmental management must not be selective and concentrate on such issues as the ozone layer, warming-up dangers, etc. Eradication of poverty is a necessary condition in any effective global environment management.

9. I have discussed some of these implications in a recent paper. See Philip Ndegwa, Africa and the World Bank: Towards Establishing Better Working Relations, paper prepared for a Conference organised by the World Bank on African Economic Issues, June 4-7 1990, Nairobi.

10. Millard Arnold, The Christian Science Monitor, Wednesday December 11 1990.

11. Africa's Submission to the Special Session of the U.N. General Assembly on Africa's Economic and Social Crisis, 1986.

12. I have discussed this subject in greater detail elsewhere. See Philip Ndegwa, op. cit. This subject has also been examined extensively by many other analysts.

13. I have discussed this subject in some detail in Philip Ndegwa, Cooperation among Sub-Saharan African Countries: an Engine of Growth? Journal of Development Planning No. 15, United Nations, 1985.

14. World Bank, Sub-Saharan Africa: From Crisis to Sustainable Growth, 1989, p. 152.

15. For an elaborated discussion of this point see my article quoted in footnote 13.

16. In planning the necessary delinkage African countries should, however, recognize the importance of diversifying their economic ties. In that connection they should try to develop mutually beneficial links with the countries of Asia from which, incidentally, they can import more appropriate technologies among other benefits.

17. Brain drain is a serious problem for the continent. African countries are exporting the very high-level manpower they need – doctors, professors, aeroplane pilots, and so on. At one time, for example, it was estimated that there were more Ghanaian doctors in America than in Ghana.

AN ASSESSMENT OF THE MAJOR ASSUMPTIONS OF REALISM

Moisés Silva Fernandes*

In the attempt to explain and understand international relations, a number of theories have competed for prominence among scholars. Foremost among these is realism, a theory which has evolved from such historical writings as those of thucydides, Machiavelli and Hobbes. The ideas of these classical theorists differ in many aspects, as do those of their contemporary advocates, yet it is possible to discern certain congruencies within their work. This enables the creation of a school of thought to which the realist label can be applied. The main assumptions of realism have been widely criticized for their weak foundations, their 'ethical poverty', and their overemphasis on such poorly defined concepts as power and national interest. Despite these charges, realism continues to receive much interest from the academic community and beyond. As Hedley Bull has noted, its "doctrines... profoundly affected a whole generation of students... [T]he lessons of the realists have to be learnt afresh by every new generation" (quoted in Smith 1986:21). Despite its flaws, realism raises many important questions; furthermore, it has generated a number of important insights into international relations. For these reasons, the study of realism continues to be relevant, and it is thus that this paper will delineate and critique the major assumptions of realist theory.

When evaluating the role played by realist theory in terms of understanding international relations, it is necessary to first question the purpose of theory. In his book, *Realist Thought from Weber to Kissinger*, Michael Smith asks:

> Must an adequate theory generate testable hypotheses, with its propositions rigorously, even deductibly, related, so that prediction, at least under controlled circumstances becomes possible? Or is it enough for a theory to define key questions and concepts, to seek to identify patterns in the behavior of states in history, to try to understand how and why states act as they do with an awareness that 'the more we understand the clearer we should be about the limits and uncertainties of prediction?' (1986-219).

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To this debate is added the problem of competing images of international relations, and hence disagreement regarding the nature of international relations theory. As Inis Claude has noted:

> ... it is unfortunately true that there exists no well-defined body of systematic thought which clearly deserves that rather dignified title. The theory of international relations is as yet a thing of shreds and patches" (1962:8).

A solution to this debate is thus beyond the scope of this paper, yet it is important to keep this point in mind throughout the following analysis, and to assess realism's contribution to this debate. By examining the main assumptions of realism, the point is not only to determine their validity but also to evaluate their usefulness in terms of creating an employable theory of international relations.

Initially, it is important to qualify what is meant in this paper by the term realism. A wide variety of authors with sometimes very distinct viewpoints have all been labelled realists, and thus it is with some hesitation that the term is applied. Yet for the purposes of analysis, criticism, and so forth, some simplification is necessary; but one must be wary of oversimplification. Within realist writings it is possible to draw out several themes which reoccur, and it is with these common strains that this paper will be concerned. With this caveat then, the main assumptions of realism are: state-centricity; the state as a unitary, rational actor; the notion of power; the primacy of national security issues; and the emphasis on structure. As a final note, the paper will consider the criticism levied against realism's alleged "ethical poverty". This should by no means be construed as an exhaustive list but rather one suitable for analysis.

Since realist analysis focuses on the actions of states, the state-centricity assumption is one of the most fundamental. This assumption stems from the realist belief that "the important unit of social life is the collectivity and that in international politics the only really important collective actor is the state (Smith 1986:219). Admittedly, the notion of the state is an abstraction; but it receives its expression from the individuals which compose it, and thus can be treated as if it were a concrete reality.

In addition to being the most important collective actor, states are also sovereign entities which recognize no authority above themselves. Waltz has explained this quality as follows:

> To say that states are sovereign is not to say that they can do as they please, that they are free of others' influence, that they are able to get what they want.... To say that a states is sovereign means that it decides for itself how it will cope with its internal and external problems, including whether or not to seek assistance from others and in doing so to limit its freedom by making commitments to them" (1979:96).

This description is in line with the realist claim that international relations take place within a state of anarchy. Used in this fashion, anarchy means only that there is no supreme authority, that there is no set hierarchy among states. This is not to say that there is

necessarily chaos or disorder. As Waltz explains, "While states retain their autonomy, each stands in a specifiable relation to the others. They form some sort of order..." (1979:100). Order does in fact exist, but it is not fixed; order is constantly changing or it has the possibility to change.

This assumption has been widely criticized for the lack of attention paid to non-state actors and transnational actors. With the rise in influence and power of such bodies as the United Nations and multinational corporations, critics claim that realists are ignoring a very vital component of international relations. The immediate response to this criticism is that realism does not deny the existence of non-state actors; rather, it relegates them to secondary importance. As Keohane notes: "Understanding the general principles of state action and the practices of governments is a necessary basis for attempts to refine theory or to extend the theory to non-state actors" (1986b:159). Waltz's rebuttal to this criticism is twofold. First he states that the emphasis on states is based on the fact that they are the *major* actors in international relations, note the only actors. Secondly, Waltz claims that any effective non-state actors are those which have themselves "acquired some of the attributes and capabilities of states, as did the medieval papacy in the era of Innocent III" (1979:88). Moreover, Waltz states: "It is important to consider the nature of transnational movements, the extent of their penetration, and the conditions that make it harder or easier for states to control them" (1979:95). Although he acknowledges the importance of non-states actors, his view of their role is subjugated by his belief in state-centricity. That is, he considers the role of non-state actors but always in relation to their effect on the actions of states. The outcome of his research, then, will obviously favour the primacy of states because this is the view he holds to begin with.

At this point a word on the role of facts and values in international relations theory is in order. Although realism has attempted to postulate a "value-free", based on the model of the objective, natural sciences, it can easily be shown that this is impossible. In her book, *Readings in the Philosophy of the Social Sciences,* May Brodbeck has written:

> Values... intrude into even the most austere attempts at objectivity at two points in our investigations. First, they determine the subject matter we select for study, and, secondly, they influence our judgement about the cause of a specific event (1968:80).

Because men's actions result from intention (rather than the occurrence of natural phenomena due to natural law) we can never know *precisely* what influenced and/or caused their behaviour. We can only infer based on what information we are aware of, and this process of inference is subject to value-laden judgements. If inference is the best that can be done, then it must be accepted but not without a warning regarding its subjectivity.

The second assumption to be dealt with is that which claims that states are unitary, rational actors. For purposes of analysis, realists assume that the state speaks with one voice, and any internal disputes are resolved before a foreign policy is implemented. Secondly, the state is said to be rational in that it evaluates policy options according to a cost-benefit analysis in which its preferences are clearly prioritized. Thus the policy which

maximizes the state's interests is chosen. Morgenthau explains the concept of rationality in terms of the notion that governments "have consistent, ordered preferences, and that they calculate the costs and benefits of all alternative policies in order to maximize their utility in light both of those preferences and of their perceptions of the nature of reality" (Keohane 1986a:11). While this conception is not incorrect, it is also not necessarily true.

The model of decision making used by Morgenthau is that of the rational actor, a model which does apply to some decision making situations. But there is great debate over which decision making theory is more appropriate. For example, the bureaucratic politics model has recently been seen as more likely to be valid[1]. In this model decisions are a result of complex interaction and bargaining between various individuals and organizations involved in the decision making process. The result is thus not necessarily the best alternative but more likely the best compromise; that is, able to satisfy the greatest number of participants. Hence the term satisficing has been accorded more validity than Morgenthau's conception of maximizing[2]. The bureaucratic politics model also contradicts the realist notion of the state as a unitary actor; it sees the state as disaggregated into competing components, which is complementary with the pluralist notion of international relations.

Keohane argues that assumptions of maximizing rationality may lead to incorrect observations:

> This objection [to maximizing rationality] is reinforced by recent findings that satisficing or near rational behavior at he unit level can produce substantially different system level outcomes than those characteristic of maximizing rationality... Conceptions of satisficing or near rationality open up the possibility of constructing systemic theories of world politics that do not rely on the implausible unit-level assumption of perfect rationality built into classical microeconimics (1986a:13).

In response to such criticisms, Morgenthau acknowledged that rationality was not always a valid assumption, but that it

> serves a valuable theoretical function. With it the analyst can infer actions from interests, and thereby construct an explanatory theory of behavior. Against the baseline provided by the theory's prediction, we can ask how 'imperfections' caused by misperceptions, a lack of information, bargaining perversities, or even sheer irrationality could have made actual patterns of behavior diverge from our expectations (keohane 1986a:12).

Keohane, in a criticism levelled not only at the rationality assumption but also at the realist emphasis on systemic forces, explained why the rationality assumption is essential to realism:

> The link between system structure and actor behavior is forged by the rationality assumption, which enables the theorist to predict that leaders will respond to the incentives and restraints imposed by their environments. Taking rationality as a constant permits one to attribute variations in state behavior to variations in characteristics of the international system (1986b:167).

Otherwise, factors internal to states would have to be relied upon, which would be at odds with the central concept of system and structure. The realist defence of this assumption lies partly in their reliance on systemic forces (which will be dealt with later in the paper) and partly in their claims to parsimony. A theory which had to deal with the internal factors of states as well as the external environment loses its parsimony. Yet it is clear that the realist avoidance of domestic forces is a debilitating one.

From the rationality and unitary assumptions we can proceed to the concept of power, one of the key elements of realism. Most realists have a pessimistic view of human nature which posits "a search for power and security as a fundamental human motivation" (Smith 1986:219). By extension, then, the state, as a human collective, is also fundamentally concerned with power, a condition which is exacerbated by the anarchical nature of international relations: without a supreme authority there is nothing to govern or regulate the competition for power. Moreover, it is this very anarchy which is a source of conflict: states must resort to force to protect or pursue their interests in the absence of an international governing body. As Waltz claims, states continually seek to maximise their power. Power is thus a key concept in realist analysis because it is the basis of state behaviour. Moreover, the combination of the power and rationality assumptions provide the analyst with a state's utility function, from which inferences about state behaviour can be made. As Keohane notes:

> The Realist definition of interests in terms of power and position is like the economist's assumption that firms seek to maximize profits: it provides the utility function of the actor. Through these assumptions, actor characteristics become constant rather than variable, and systemic theory becomes possible (1986b:167).

Keohane has acknowledged the importance of the realist focus on power and interests as contributing to an understanding of how nations deal with one another (1987:127). As Morgenthau has stated, "International politics, like all politics, is a struggle for power. Whatever the ultimate aims of international politics, power is always the immediate aim (1968:97).

The realist notion of power suffers from a number of ills, first among them being definitional ambiguities. As the literature lacks consensus, power is defined both statically and dynamically: statically, as the sum of a nation's capabilities, or as capabilities relative to those of other states; and dynamically, in terms of a state's willingness to use these capabilities, and its influence over other states (Viotti & Kauppi 1987:44). Morgenthau differentiates between political power and national power, where the former is "a psychological relationship between those who exercise it and those over whom it is exercised," and the latter is a function of geography, natural resources, military preparedness, industrial capabilities, population, and so forth (Morgenthau 1968:27).

The difficulties of defining power are compounded by the difficulties of measuring it. If power is the sum of a nation's capabilities, then how does one weigh each capability? Which is more important, military or economic power? Moreover, how does one compare these capabilities to those of other states? Although some methods of measurement have been suggested, there is yet to develop any sort of consensus on the matter.

There also exists confusion over whether power is an end or a means. Morgenthau claims it is both: power may be an end in itself or a means to achieve such ends as economic, political, territorial, religious, and so forth (1968:97). This, however, contributes little to an understanding of how nations formulate foreign policy goals, or how that power is translated into a certain goal.

The fungibility of power is highly problematic for there is no theoretical mechanism for the translation of acquired power in one area to the accumulation of power overall, or to the attainment of specific goals. For reasons of parsimony, realists often claim that power is homogeneous and fungible. In his book, *Theory of International Politics*, Waltz asserts:

> States, because they are in a self-help system, have to use their combined capabilities in order to serve their interests. The economic, military, and other capabilities of nations cannot be sectored and separately weighed. States are not placed in the top rank because they excel in one way or another. Their rank depends on how they score on *all* of the following items: size of population and territory, resource endowment, economic capability, military strength, political stability and competence (1979:147).

Power fungibility is necessary for parsimony, as Keohane notes: "on the basis of a *single* characteristic of the international system (overall power capabilities), *multiple* inferences can be drawn about actor behavior and outcomes" (1986b:167).

But the fungibility claim can be easily disproven through examination of such events as the American experience in Vietnam or Arab control over oil production. In both cases the loser in the struggle was the greater power of the two. According to the fungibility assumption, the greater power should prevail based on its ability to translate power from one issue area to another. Yet this is infrequently the case (Keohane 1987:147-149). Thus Keohane suggests two possible solutions to the problem.

1 - Assuming fungibility of power, discrepancies between power resources and outcomes can be explained by determining a motivational component. That is, where the weaker party triumphs, it may be able to explain this according to the relative importance attached to the issue by both sides. But this is degenerate, that is, must be done after the fact. Thus, to "use this insight progressively rather than in a degenerate way, Realist theory needs to develop indices of intensity of motivation that can be measured independently of the behavior that theories are trying to explain" (1987:149).

2 - Alternatively, the fungibility assumption could be relaxed, in which case the result would be that certain states possess greater power in certain issue-areas than other states, though the former may be overall weaker than the latter. With this method it becomes easier to determine a state's relative strength as well as its goals.

The assumption that states seek to maximise power is also questionable. Waltz asserts that states "at a minimum, seek their own preservation, and at a maximum, drive for universal domination" (1979:118). The maximization assumption is necessary to the parsimoniousness of the theory, for "if we assumed only that states 'sometimes' or 'often'

sought to aggrandize themselves... we would have to ask about competing goals, some of which would be generated by the internal social, political, and economic characteristics of the countries concerned" (Keohane 198b:174). This would be in opposition to realism's claim that states' actions are determined by systemic forces, not domestic ones. In this case, realism would be demoted to the status of a partial theory.

Central to the notion of power is the concept of the balance of power, a term which has been widely criticized for its ambiguous usage. The term generally refers to an equilibrium among states, yet the literature is unclear as to whether this equilibrium is an inherent characteristic of the state system arising as a result of systemic forces or whether is can be manipulated by statesmen. Adherents of the first view have been labeled determinists. while those theorists advocating the second are referred to as voluntarists.

On the determinist side, one finds such theorists as Morgenthau and Waltz, although neither are particularly clear about the issue. In *Politics Among Nations*, Morgenthau states:

> The aspirations for power on the part of nations, each trying either to maintain or overthrow the status quo leads of necessity to a configuration that is called the balance of power and to policies that aim at preserving it (1968:161).

Although Morgenthau initially reveals a determinist attitude, in the same breath he asserts that statesmen will pursue policies aimed at preserving the balance of power, thereby giving credibility to the voluntarist argument. For his part, Waltz states that an equilibrium will inevitably result from the interactions of states who are motivated by considerations of power, He states that the balance of power theory "is built up from the assumed motivations of states and the actions that correspond to them. It describes the constraints that arise from the system that those actions produce, and it indicates the expected outcome: namely, the formation of balances of power" (1979:118). Thus waltz argues that a balance of power is a systemic tendency over which statesmen have little control.

On the other hand, the mechanistic quality of this theory has been criticized by those who believe that statesmen do play a role in affecting international events. Such theorists as Kissinger belong to this group, whose members claim that statesmen deliberately choose to pool their capabilities to repel the advances of a state or group of states which threaten international stability. The balance of power in this sense is a tool wielded by statesmen to prevent to dominance of any one nation over another.

The debate between these two interpretations is exacerbated by further competing claims regarding the nature of the balance of power. Ernst Haas has outlined eight distinct meanings of the term, and Martin Wight has discovered nine (Waltz 1979:117). Inis Claude, in his book *Power and International Relations* refers to the balance of power as an equilibrium; a disequilibrium (balance in one country's favour); the current power configuration; a policy (the policy of balancing); a struggle or competition for power; and as a system (1962:13-21). The result of this unresolved debate is that one of the most central components of realist theory is a deplorably ambiguous and therefore virtually useless term. Closely related to power is the realist assumption that on the international

agenda, security issues are primary. Since the pursuit of power has been posited by realists as the main goal of states, security against this challenge must thus also be advocated. The argument then proceeds that security against threats from other states is necessary for a state to survive and offer benefits to its citizens. Security is thus a prerequisite to all other goods. Critics charge that realists wrongly ignore other goals of states and that military-security issues no longer dominate the agenda of international politics. The realist response to this accusation is twofold: first, that realism does not ignore the existence of other goals but rather places them behind that of security; second, that it is the relative security of the past forty-five years that has led to an increase in the importance of other pursuits, be they economic, ecological, moral or the like. But in order for these goals to receive attention, security must be first assured. Security remains an issue of primacy, but because it is not immediately threatened it only appears to be of lesser importance; in other words, realists would argue that states in the 1980s take their security for granted. This argument does little to answer the challenge posed to this assumption; the realist neglect of issues other than military-security ones remains an unanswered criticism of realism.

The importance accorded to structure by the realist school which has been touched on briefly will now be dealt with in a more thorough manner. Although the emphasis on structure can be seen in most realist writings, it is more common in modern realism, which has also been called structural realism or neorealism. Kenneth Waltz can be seen as one of the most influential writers on this subject, and certainly his book *Theory of International Politics* has been the source of lengthy debates. Although Waltz's explanation of structure and its effects is highly complicated, a simplified description will suffice for our purposes of analysis. For Waltz structure is the key to any useful theory of international relations. He states that: "the structure of a system is generated by the interactions of its principal parts," which in this case are states. (1979:72). Although it cannot be seen, the structure works as a constraint on states' actions, affecting state behaviour "through socialization of the actors and through competition among them." In this case, when states A and B interact, each "is not just influencing the other; both are being influenced by the situation their interaction creates" (1979:74). Thus structure is important because the situational context, through constraints and incentives, affects state behaviour. In this sense structure can be seen as an intervening variable between states' actions and their outcomes.

For a good systemic theory (as Waltz proposes to give), system-level and unit-level variables must be clearly delineated. To distinguish between the two, "[d]efinitions of structure must leave aside, or abstract from, the characteristics of units, their behavior, and their interactions" (1979:79). This achieves a positional picture of society which does not include states' attributes or behaviors. Structure is defined according to the arrangement of states in relation to one another, which is determined by power capabilities. As Waltz notes: "The units of an anarchic system are functionally undifferentiated. The units of such an order are then distinguished primarily by their greater or lesser capabilities for performing similar tasks" (1979:97).

The notion of structure, like that of power, is plagued by a great number of definitional ambiguities: is structure created by interstate relations, or by the distribution of

capabilities? Waltz claims to describe structure without reference to the characteristics of the units, yet are capabilities not a characteristic? To this query Waltz replies,

> Although capabilities are attributes of units, the distribution of capabilities across units is not. The distribution of capabilities is not a unit attribute, but rather a system-wide concept (1979:98).

His response is murky as he does not explain *how* the distribution of capabilities is a systemic attribute.

Furthermore structure is also found to be an incomplete indicator of state behaviour. Snyder and Diesing's attempts to explain state behaviour through the application of game theory within an explicit structural context have proven that structure is not enough to determine states' behaviour (Keohane 1987:141). Although structure affects states' actions, variables internal to states -- like problems of perception and group decision making -- are also important. But realism fails to deal with such factors. This compartmentalisation of domestic and international environments robs the theory of its explanatory and predictive power.

This problem has been dealt with to some extent by realists such as Waltz and Gilpin who recognize that interests cannot always be derived from the position of states and their power capabilities. They have thus retreated to what Keohane terms a "fall-back position"; "that is, *given state interests*, whose origins are not predicted by the theory, patterns of outcomes in world politics will be determined by the overall distribution of power among states" (1986b:183). In this way the realists have attempted to patch up one of the greatest weaknesses in their theory by stating that they are not responsible for it.

Recognising the importance of systemic theory to understanding international politics yet finding Waltz's contribution unsatisfactory, Keohane proposes a number of revisions. First, he recommends that greater attention be paid to the domestic factors internal to states by incorporating "better theories of domestic politics, decision-making, and information processing, so that the gap between the external and internal environments can be bridged in a systematic way" (1987:153). Such an integration between international and domestic structural theories would greatly increase the theory's predictive powers.

Secondly, Keohane suggests that rather than one overarching structure (as Waltz proposes) there exists a number of structures determined by issue-area. This proposal would also require the acceptance of his earlier stated belief that power is essentially infungible. Thus while system and structure are important to international relations theory, realism's treatment of these concepts is incomplete.

As a final note, it is appropriate to address realism's lack of normative content, or its "ethical poverty" (Melakopides 1989). For most realists, moral considerations play little if any role in international politics. The applications of ethics to politics is seen as a trifling if not dangerous notion which may lead statesmen awry by painting a picture more bright than reality; for although reality may be less than the desired state of affairs, we are

nonetheless forced to deal with this reality. Realists cite the mistakes of the interwar period as an example of the dangers of idealism.

It is this very notion that is at the heart of realist criticism: an acceptance of the status quo to the point of rejecting *any* alternatives makes realists guilty of propounding a self-fulfilling prophecy. Realism envisions the world system as unchangeable, almost as if the current system of international organization is the 'proper' or 'true' situation. By focusing on the nation-state as the main actor, realism perpetuates the state system. As Viotti and Kauppi note:

> By describing the world in terms of violence, duplicity, and war, and then providing advice to statesmen as to how statesmen should act, such realists are justifying one particular conception of international relations (1987:61).

Realism fails to provide alternatives to the current dismal situation. Although realism raises the question as to how peaceful change may occur, it does not attempt to answer it but rather seems content with formulations for its continuance.

From their earliest writings realists have attempted to deny the role of ethics in politics. As Thucydides notes, "in international politics only the weak resort to moral argument" (quoted in Smith 1986:7). Morgenthau and Neibuhr assume that "there is a tragic and uncloseable gap between ethics and politics.... [The] tension between the two aspirations, for power and for virtue, is an 'irresolvable' tragedy" (Hare & Joynt 1982:34). The separation of politics and morality insisted on by such theorists is their fatal mistake: for the two planes are uncontrollably intertwined. Every time a statesman makes a choice, he is exercising his value judgement by choosing one path or alternative over another. As Michael Banks points out: "Factual statements blend in with value judgements; preferences intrude despite the best efforts of scholars to maintain their objectivity" (1984:4). According to Keohane, realism's inability to recognize this value choice is based on its utilitarian, "positivist commitment to technical rationality and the dichotomy between scientific knowledge and values" (1986a:19). This dichotomy, as argued above, is unnatural; thus one of realism's major philosophical underpinnings loses its credibility.

The criticisms of realism as outlined in this paper are multiple; but many of them could be rectified through minor revisions and methodological adjustments -- all except the final consideration. The absence of normative thought in realist theory condemns the world to pessimism and conflict. Axel Dorscht and Gregg Lagare address the issue as follows:

> insofar as perception 'creates' the world we live in, the realist worldview may act to create the type of world in which policy-makers, journalists and citizens claim they must operate. While on one level it is arguable that the power politics view of the world is only an acknowledgement of the reality 'out there,' in another sense this argument is inadequate because the worldview itself has a role in creating that reality through its effect on the interpretations, norms and expectations that people form of world events. It also heavily affects the discourse and language used in discussions of international politics and foreign policy (1986:8).

A way out of the trap must be found. Realism alone will not provide the solution; at the same time, normative theory without a realist base will not succeed either. It is at this point that we can evaluate realism's contribution to debate on theory, discussed above. Realism asks valuable questions necessary for the formulation of a workable theory of international relations. Where it fails, however, is in its inability to answer any of these questions. This is the realm of normative theory, which through the use of 'ought' propositions enables us to create at least some tentative ways out of the 'trap'. The two theories are not mutually exclusive, as some have claimed. Rather, they complement each other. Advocates of both paradigms must remember that "peace and power are closely linked" (Dorscht & Lagare 1986:6).

Notes:

1 - There exists a number of other models which may provide greater insights, but in the interests of time and space only the bureaucratic model will be considered.

2 - However, the notion of satisficing makes assumptions about power which are contradictory to the claims of the critics of realism, as will be shown later.

3 - To be fair, Waltz rejects this notion. In his book, *Man, the State, and War* (1959), he notes that pessimists wrongly "pin the blame on one or a small number of behavior traits" (p. 39). He further states that, "human nature is so complex that it can justify every hypothesis we may entertain" (p. 40). For his part, Waltz sees the search for power as a response to systemic forces.

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REPERCUSSÕES DAS MUDANÇAS DA ESTRUTURA MUNDIAL NO DIREITO INTERNACIONAL

Embaixador Ramiro Saraiva Guerreiro

Os anos recentes viram mudanças de tal ordem na conjuntura e, mais do isso, na estrutura internacional, que há quem fale no fim do século e início de outro. Politicamente, já estaríamos no século XXI que começou cedo, ao contrário do século XX que começou tarde, com a 1ª Guerra Mundial, e foi, portanto, muito curto. Outros chegam a falar do fim da história.

Os fatos não precisam ser descritos aqui, pois são do domínio público e têm sido expostos, comentados e interpretados *ad nauseam* na imprensa, em revistas especializadas ou não, em livros mais ou menos pretenciosos.

Cabe não nos excitarmos em demasia com a dramaticidade dos fatos. A história é um *continuum* e tampouco acabou. O que acabou foi a "guerra fria" que marcou duas gerações, ao ponto de estarem Governos e povos já acostumados às suas características. Agora, têm de enfrentar uma situação nova e devem proceder a um esforço de adaptação. Todo esforço de adaptação, até mesmo a situações melhores, incomoda, cansa. Não há nada mais cômodo do que a rotina.

A nova situação, entretanto, não é de natureza nova. Com toda a sua especificidade não é mais do que um momento em que há oportunidade e necessidade de reorganizar as relações entre governos, com efeitos evidentes em instituições internacionais. Não se trata de um momento diferente, no que tange à sua natureza essencial, da paz de Westphalia, do Congresso de Viena, da Conferência de Versalhes, ou do fim da Guerra Mundial.

A principal diferença está, talvez, em que não houve uma "debellatio", uma vitória militar em que os vencedores dispõem dos vencidos, alteram o mapa do mundo, o reorganizam segundo um plano definido e/ou criam instituições novas.

Parece mais o fim de uma contenda mundial, incruenta. A Segunda Guerra Mundial não deixou de ter características de guerra civil. Mas agora a oposição entre os partidos,

entre concepções diferentes da sociedade, se resolveu pela decadência e dissolução de uma das partes por processo interno. Daí resulta que o corifeu de uma das coligações passa a ter ascendência em todo o mundo e as formas de organização social e econômica tendem à uniformidade. Tais circunstâncias acabariam por ter repercussões no direito internacional que regula as relações entre os Estados.

As repercussões, entretanto, são menores, ou menos profundas, do que os fatos políticos poderiam sugerir, embora tenham surgido sinais de uma evolução preocupante para os países mais fracos.

Ao fim da guerra dos trinta anos consagrou-se a nova ordem de Estados soberanos, não sujeitos à suserania do Imperador e à arbitragem do Papa, completando-se um processo que vinha do fim da Idade Média. Considera-se que nessas condições se desenvolveu o direito internacional. Na Idade Média havia a descentralização feudal e um sistema hierarquizado dos poderes que reconheciam as duas citadas autoridades. Embora os monarcas agissem como se fossem livres, se guerreassem, fizessem tratados de paz e até cooperassem, sempre se entendia que estavam sujeitos às limitações da religião com efeitos temporais e, em certas regiões, à suserania do imperador.

Em um império universal não há, por definição, direito internacional. Em Roma, o trato de estrangeiros se regia por um direito interno, o *jus gentium*, definido e aplicado pela cidade imperial.

A primeira constatação a fazer é no sentido de que o direito internacional continua a basear-se, essencialmente, nas condições que se definiram na Paz de Westphalia, com as adaptações que sempre são necessárias. A Carta da Organização das Nações Unidas continua a ser a ordem vigente, baseada no princípio da igualdade soberana de todos os seus Membros, como reza seu artigo 2, inciso 1º.

O Presidente dos Estados Unidos da América, por ocasião da "guerra no Golfo", referiu-se a uma nova ordem. Ele mesmo, passados uns meses, deixou de falar em nova ordem, talvez por motivos internos. Os Estados Unidos da América se haviam tornado a única superpotência, mas estavam longe de ser o centro unipolar de uma nova ordem. Em parte, porque sua opinião pública, embora ainda internacionalista, mostra sinais de oposição ao predomínio das preocupações externas. Os enormes déficits comercial e orçamentário, a recessão, o desemprego, têm levado setores importantes a tendências isolacionistas e nacionalistas. Tem-se como certo que líderes dessas tendências não prevalecerão nas eleições, mas de qualquer forma, tais tendências não deixarão de estar presentes na complexa avaliação de fatores eleitorais, por todos os candidatos. Terão, pois, algum efeito cerceador, ou pelo menos moderador na atividade externa, o que, sob o prisma que nos interessa, não deixa de ter aspectos positivos. As possibilidades de ação unilateral da única superpotência também encontram dificuldades externas. Dificilmente, por exemplo, os E.U.A. poderiam promover sozinhos a intervenção no Golfo Pérsico. Não apenas por causa da imensa vantagem política de contar com um apoio internacional generalizado, senão também porque os custos financeiros seriam proibitivos não fossem as contribuições da Alemanha, do Japão e, principalmente, da

Arábia Saudita. Sendo a Superpotência a única força capaz de impor o direito, não poderia fazê-lo, porém, sem a colaboração política e financeira externa.

O fato de um único país concentrar, de forma incontrastável, o poder militar, não deve ter repercussão fundamental em um direito internacional que é baseado na igualdade dos Estados.

Nem a filosofia de vida e concepção política de tal Superpotência, nem seus recursos financeiros, nem seu interesse, a levam a inquinar esse pressuposto básico de igualdade dos Estados. Influência política é outra coisa e não se estuda propriamente em direito internacional. Exigiria outra aula, várias aulas, todo um curso.

O direito internacional, pelo contrário, historicamente foi-se tornando mais igualitário e deixando de refletir as diferenças de poder. As manifestações de ordem geral acabaram; não se fala mais de um direito das nações civilizadas, diferente do trato a bárbaros e selvagens; não se limita a representação por Embaixadas às Grandes Potências, devendo as demais contentar-se com Legações; não há mais precedências protocolares que hoje nos soam cômicas, dos imperadores sobre os reis e das monarquias em relação às repúblicas. É evidente que continuam a haver desigualdades de fato que não se devem refletir, por princípio, no *status* em direito.

Mas, e as diferenças institucionalizadas na Carta da ONU e nos organismos financeiros? As diferenças formais, de cerimonial, entre potências desapareceram para serem substituídas por categorizações substanciais, na verdade explicadas por necessidades funcionais. As diferenças em direito, vistas como exceções ao princípio da igualdade, resultaram das instituições criadas ao fim da Guerra Mundial, ainda vigentes, explicadas pela necessidade de uma solidariedade internacional melhor definida e assegurada que evitasse, por um lado, a competência de fazer a guerra, até então reconhecida aos Estados e, por outro, a repetição da grande crise econômica dos anos 30 que levou os países a frustrantes políticas de âmbito puramente nacional.

Podemos usar, como ilustração sobre o sentido do processo de manutenção da paz pelo Conselho de Segurança, a ação bélica no Golfo Pérsico.

Para manter a paz, o método adotado é o da segurança coletiva, que isola o agressor e mobiliza os demais Membros da Organização para fazer cessar a ruptura da paz, por meio de sanções econômicas, políticas e diplomáticas, ou por sanções militares. Seria ineficaz um sistema de segurança coletiva que não dispusesse da força de quem a tem. Por isso, não só a adoção de sanções, mas até mesmo resoluções em processos pacíficos, do capítulo VI da Carta, que possam evoluir para o uso da força, estão sujeitos ao chamado "veto", isto é, requerem nove votos afirmativos, inclusive os dos cinco membros permanentes. Muito se tem criticado tais dispositivos e tentativas foram feitas para abolir o privilégio. Acontece, porém, que ninguém pode imaginar que se apliquem sanções contra uma grande potência por decisão alheia. Ter-se-ia no caso uma grande guerra que se quer evitar. Além disso, sanções aplicadas a agressores menores não se poderiam efetivar sem engajar os meios de ação das grandes potências. Hoje, pode-se dizer que os meios são dos E.U.A., financeiramente ajudados por outros países que, inclusive, não são membros permanentes.

Uma vez assisti a um programa de televisão, sobre o conflito no Golfo, em que um dos participantes disse que o conflito era uma prova de fracasso da ONU, que não evitara a "guerra". Ora, tratava-se, pelo contrário, de uma prova do funcionamento do sistema de segurança coletiva que constitui o próprio cerne da organização mundial. Falhados os esforços conciliatórios, adotaram-se medidas, obrigatórias para os Estados membros por força do artigo 25 da Carta, que foram executadas de forma a obter que o agressor se retirasse do território alheio que ocupara. Não houve, juridicamente, uma "guerra", mas uma ação de polícia. O Conselho funcionou como resultado do fim da guerra fria e conseqüente restabelecimento do pressuposto da Organização, isto é, da cooperação entre os Membros permanentes. De certo modo, pois, quando o Presidente Bush falou, como já mencionamos, em uma "nova ordem", na verdade estava-se, verificando a efetivação da ordem, já antiga, criada logo após a Segunda Guerra Mundial.

Se a Organização funcionaria da mesma maneira em outros casos de agressão é matéria para especulação, mas não infirma juridicamente o que foi dito.

É verdade que houve casos de agressão em que o Conselho de Segurança, paralisado pelo "veto", não funcionou, verificando-se reação do organismo mundial apenas por intermédio da Assembléia Geral, cujas resoluções são recomendatórias, não legalmente obrigatórias. O que houve no conflito do Golfo foi não somente resultado do fim da guerra fria, cujas conseqüências foram mal calculadas pelo agressor, senão também o fato de que a situação era completamente nova. Na verdade, em casos anteriores (Grenada, Panamá, Afeganistão) houve intervenções limitadas, tendo os agressores em todo momento afirmado que se tratava de ações transitórias necessárias à sua segurança, que não visavam em absoluto à supressão da soberania do Estado objeto da intervenção. Mesmo no caso da ocupação dos territórios árabes por Israel, pode-se condenar o domínio de um Governo sobre populações alheias, mas não houve supressão de um Estado membro da ONU, como no caso da invasão e incorporação do Koveite pelo Iraque.

Tem havido sempre alguma violação de norma do direito internacional, sem que isso implique revogação ou perda de valor legal de tal norma. É preciso sempre reiterar a norma para que os fatos isolados não formem costume ou justificativa.

No caso da ordem vigente, baseada na Carta das Nações Unidas, o risco estará, nas condições unipolares de hoje, talvez menos em falhas ou insuficiências, de seus dispositivos, do que em sua aplicação abusiva, *praeter legem*, por analogia, por interpretações exorbitantes.

Antes do fim da guerra fria, por ocasião da discussão da questão de Grenada no Conselho de Segurança, por exemplo, a representante americana, Jane Kirkpatrick, defendeu a tese de que os princípios da Carta devem ser tomados em seu contexto, o que é óbvio, para daí tirar a conclusão, injustificável, de que um Estado pode usar meios coercitivos para atender a objetivos como a democracia e o respeito aos direitos do homem, que são propósitos da organização. É evidente que tal corolário viola claramente o artigo 2, parágrafo 4 da Carta. Talvez se baseasse na parte final do dispositivo citado em que o uso da força ou da ameaça da força, não deve constituir "ação incompatível

com os Propósitos das Nações Unidas". Sempre se entendeu, porém, que o uso da força está limitado pelo monopólio estabelecido em favor do Conselho de Segurança, com a única exceção da legítima defesa, prevista no artigo 51 da Carta.

No âmbito do capítulo VII, que prevê sanções, o Conselho "determinará a existência de qualquer ameaça à paz, ou ato de agressão, e fará recomendações ou decidirá que medidas deverão ser tomadas de acordo com os artigos 41 e 42, a fim de manter ou restabelecer a paz e a segurança internacional". Os termos são amplos mas têm como referência indiscutível a manutenção da paz e segurança e não outros objetivos, por louváveis que sejam.

A confusão, a porta aberta para interpretações estensivas indevidas, é estimulada por outros dispositivos da Carta, amplíssimos, que se referem à competência da Assembléia Geral, como o artigo 14:

> "A Assembléia Geral, sujeita aos dispositivos do artigo 12, poderá recomendar medidas para solução pacífica de qualquer situação, qualquer que seja sua origem, que lhe pareça prejudicial ao bem estar geral ou às relações amistosas entre as nações, inclusive em situações que resultem da violação dos dispositivos da presente Carta que estabeleceu os Propósitos e Princípios das Nações Unidas".

Igualmente amplo é o artigo 34, que trata dos poderes investigatórios do Conselho. Em ambos casos, o poder reconhecido tão amplamente se refere a resolução não obrigatórias, a medidas de caráter pacífico, recomendatório, suasório apenas.

Uma situação interna pode vir a representar uma ameaça à paz no sentido do artigo 39. De certo modo, as intervenções do Conselho de Segurança em assuntos internos da África do Sul se explicavam por se entender que havia uma ameaça à paz internacional, tamanha a natural repulsa universal e, ainda mais, o ódio de seus vizinhos.

Nas medidas que, restaurada a independência do Kowaite, o Conselho tomou para proteção das populações curdas no Iraque já é discutível justificativa de manutenção da paz e segurança, embora a opinião pública mundial as aceitasse por sentimentos humanitários e hostilidade recente ao opressor e o próprio Estado territorial, o Iraque, houvesse consentido.

Igualmente, recente decisão para forçar a Líbia a entregar dois de seus nacionais, suspeitos de hediondo crime de derrubada de um avião, parece extrapolar das funções próprias do Conselho. É pelo menos duvidoso que a Resolução 748, de 31 de março de 1992, se justifique na base da repressão ao terrorismo e na recusa da extradição de nacionais como "ameaças" à paz, por mais negativa que seja a opinião geral em relação à Líbia. O Conselho não é uma Corte de Justiça, nem pode agir, como tal. A própria Corte Internacional de Justiça, em sua justificativa para não decretar medidas provisórias, contra a execução da referida resolução, praticamente reconhece que o artigo 25 da Carta dá caráter absoluto às decisões do Conselho. Isto é o mesmo que admitir que não há um controle constitucional das decisões do Conselho que pode agir

de forma contrária à Carta, sem que haja recurso. O resultado é, pois, gravíssimo ao permitir qualquer arbitrariedade, de qualquer natureza, desde que baseada, no entendimento do Conselho, na necessidade de reprimir ameaças à paz por ele definidas.

Este é um caso que reforçaria a opinião, hoje ascendente, favorável à criação de uma jurisdição penal internacional. Ao fim de uma guerra, os vencedores estariam em melhor situação moral, política e jurídica se submetessem os que consideram criminosos de guerra a um tribunal internacional previamente existente, do que se os julgassem por uma instância deles dependente. Em muitos casos de um governo revolucionário que queira julgar seus antecessores uma situação parecida ocorreria; nos casos de crimes de implicação internacional, como o narcotráfico, os países mais facilmente cooperariam com um tribunal imparcial do que cederiam a pressões externas. O mesmo se pode dizer no que se refere à extradição de nacionais.

Há uma tentação de usar o Conselho de Segurança para a solução decisiva de questões importantes e para a proteção de objetivos louváveis e geralmente desejados. Assim, por exemplo, entre ecologistas mais exaltados, há quem propugne atuação do Conselho em casos de violação significativa de normas fundamentais de preservação do meio ambiente. O argumento seria que nada põe em perigo a segurança da humanidade mais do que as agressões maiores e continuadas ao maio ambiente. Tratar-se-ia, assim, de agir o Conselho para proteção da segurança da humanidade.

A argumentação é falsa do ponto de vista jurídico e, provavelmente, inconveniente ou mesmo inexequível do ponto de vista político. Evidentemente, a Carta foi escrita para atender à necessidade de evitar a guerra e restabelecer, em caso de ruptura da paz, a situação anterior. Essa e somente essa a razão da aceitação pelos Governos que ratificaram a Carta, numa época em que a questão ecológica não se colocava. A pretensão exorbitária do que era a intenção dos Estados membros e do que é o próprio texto da Carta. Além disso, não vejo os Estados aceitarem a limitação à sua soberania estabelecida no artigo 25 e capítulo VII da Carta para qualquer outro fim ou justificativa que não seja a manutenção da paz.

Há, entretanto, fortes razões para dar efetividade à cooperação para a preservação do meio ambiente. Não vejo, porém, o fortalecimento de tal cooperação pela criação de competências supranacionais. Basicamente, a tendência do direito ambiental, como até agora, deverá manifestar-se por convenções que regulem a cooperação entre Estados soberanos, sujeitas ao processo de ratificação. Em matéria do que chamam de "soft law", certamente haverá grande produção de recomendações, declarações, etc., com vistas a influenciar a opinião pública e os governos. O assunto é importante e muito vivo, mas a tendência não creio seja a criação de órgãos com poderes supranacionais especializados.

Talvez a linha de evolução do direito internacional, no campo da ecologia, venha a se dirigir à formação de métodos de natureza prejudiciária. Refiro-me, por exemplo, a comissão de investigação de fatos composta por acordo entre as Partes, para estabelecer quem tem razão em uma controvérsia sobre poluição transfronteiriça, como aliás se propõe no projeto de Declaração Americana sobre o Direito Ambiental, preparada pela Comissão Jurídica Interamericana.

Quem sabe, no curso do tempo, não viesse a ser possível mobilizar uma instância internacional, imparcial, previamente aceita pelos Estados, que se pronunciasse sobre alegadas violações importantes de princípios e normas ambientais? Estamos aí de novo entrevendo uma solução judiciária para a efetivação do direito internacional, no campo da ecologia.

No campo dos direitos do homem, não menos mobilizador do que a ecologia, vimos como a evolução dos Estados foi lenta e certamente não está acabada. Recapitulemos sumariamente que, além da Declaração Universal dos Direitos do Homem adotada em 1948, o método seguido para criar obrigações internacionais nesse campo foi o convencional. Não cabiam naquela época e não cabem hoje imposições aos Estados. As restrições à soberania têm de ser voluntárias. Os Pactos negociados nas Nações Unidas, o relativo aos direitos econômicos, sociais e culturais e o relativo aos direitos civis e políticos tratam dos princípios e normas substantivas. O segundo desses instrumentos, entretanto, vai além e cria um processo de aplicação por meio de um Comitê, previsto em sua Parte Quarta. Tal Comitê tem características essencialmente diplomáticas, no sentido de que, embora seus membros sejam eleitos em qualidade pessoal, e prestem juramento de imparcialidade, seu poder se resume a receber os relatórios dos Estados, analisá-los, pedir mais informações, apresentar suas observações ao Estado Parte e mesmo transmitir esse material ao Conselho Econômico e Social. A ação implementadora comum a todos os Estados que voluntariamente ratifiquem o Pacto se limita à publicidade, à opinião pública. Para ir além desse limite e admitir uma espécie de ação contraditória entre Partes já é preciso uma manifestação de vontade específica, *ad hoc*, como se vê no artigo 41:

> "Todo Estado parte no presente Pacto pode, em virtude do presente artigo, declarar a qualquer momento que reconhece a competência do Comitê para receber e examinar as comunicações nas quais um Estado parte alegue que outro Estado parte não cumpre as obrigações estabelecidas no presente Pacto".

Em seguida, se descreve o processo a ser seguido nestes casos. O método para a solução da controvérsia, segundo o artigo 41, letra *e*, é o dos bons ofícios, isto é, o Comitê ajuda as Partes a se entenderem com base no respeito aos direitos do homem. Se falharem os bons ofícios do Comitê, este pode designar, se as Partes aceitarem, uma comissão de conciliação *ad hoc*.

O conjunto normativo inclui ainda o Protocolo Facultativo em conexão com o Pacto sobre Direitos Civis e Políticos. Como se sabe, o Protocolo é apontado como prova de que os indivíduos são sujeitos de direito internacional, pois seu artigo 1º estabelece que: "Todo Estado Parte no Pacto que se tornar parte no presente Protocolo aceita a competência do Comitê para receber e examinar comunicações de particulares sujeitos a sua jurisdição, que aleguem ser vítimas de uma violação, pelo referido Estado, de qualquer dos direitos enunciados no Pacto"- etc....

No artigo 4 se prevê que a ação do Comitê se restringe a submeter a comunicação à atenção do Estado acusado, o qual deve transmitir ao Comitê, no prazo de seus meses, explicações e declarações que esclareçam a questão e indicações das medidas que possa ter adotado para remediar a situação.

Cabe notar que toda a normatividade estabelecida é consensual, que não há mecanismo de fiscalização e execução que tenha jurisdição automática ou competência para obrigar as Partes a cumprirem decisões. Sem dúvida se reconhecem direitos individuais a nível internacional, mas em conseqüência de decisões dos Estados, que continuam a ser os únicos formadores de normas de direito.

Estamos aqui falando do direito internacional geral. É óbvio que organizações regionais dispõem de mecanismos muito mais eficazes, inclusive no Sistema Interamericano, chegando no caso de integração, a mecanismos com jurisdição obrigatória, como ocorre na C.E. No âmbito interamericano foi-se além da normatividade universal ao criar-se, também, uma Corte Internacional, cuja jurisdição depende de aceitação pelos Estados Partes. Na C.E., mais integrada, já num processo federativo, criou-se a Corte com poderes supranacionais.

Os direitos do homem incluem, a rigor, o direito a um meio ambiente saudável e, por aí, se conectam com a problemática ecológica.

Por outro lado, também os direitos do homem requerem o desenvolvimento econômico. Como disse José Antônio Pastor Ridruejo, em "Ponencia", ante o Instituto Hispano-Luso-Americano de D.I., 1992:

> "Tercera - Las situaciones de subdesarrollo dificultan la satisfación de los derechos económicos, sociales y culturales y los de la solidaridad, y crean condiciones propicias para la vulneración de los derechos civiles, y políticos.
>
> Cuarta - Consiguientemente, todo esfuerzo por mejorar a nivel mundial el respecto de los derechos económicos, sociales y culturales y los de la solidaridad, exige de la Comunidad Internacional, y particularmente de los Estados desarrollados, la cooperación más amplia posible para el desarrollo."

Como diz o autor, trata-se de uma componente preventiva na promoção dos direitos do homem.

Além do risco de que seja forçada a ampliação de competência do Conselho de Segurança para cuidar também de objetivos desejáveis, mas que não foram assegurados por instância supranacional, há a mesma tendência de desvirtuar e extrapolar a competência das instituições financeiras criadas em Bretton Woods para regular as finanças e estimular o desenvolvimento econômico.

A situação nesse caso é mais grave porque nelas têm voto ponderado decisivo os E.U.A. e poucos outros países. As finalidades de tais agências são relativas à estabilidade e progresso da economia mundial. Têm sido elas utilizadas, entretanto, cada vez mais para promover desígnios principalmente dos E.U.A., determinados pela evolução da opinião pública desse país que pressiona o Congresso que, por sua vez, exige que o Executivo instrua o Diretor Americano a não votar facilidades ou empréstimos para países que não estejam satisfazendo os *standards*, os parâmetros estabelecidos pelo Congresso para matéria estranha à estabilidade e progresso da economia mundial, como

a preservação do meio ambiente ou os direitos do homem. A deformação aí é mais grave porque leva à imposição de condições e restrições quase que exclusivamente aos países em desenvolvimento que são, por sua própria natureza, aqueles que mais têm de recorrer a essas instituições. É evidente que a preocupação ecológica é uma condicionante que deve ser levado em conta por essas instituições (cabe-lhes exigir estudos prévios de impacto ambiental), mas não deve ser a consideração precípua ou até exclusiva em suas atividades. Ser-lhes-ia próprio, ainda, financiarem segundo critérios objetivos, não politizados, projetos que incorporem aspectos ecológicos do que se chama hoje de "desenvolvimento sustentável".

Por mais admiráveis que sejam certos objetivos não se justifica tentar, por decisão unilateral, impor métodos para alcançá-los, usando a alavancagem de instituições que não foram criadas para isso. São objetivos que requerem agências e métodos específicos, criados por negociação entre todos.

Sabemos que todos os objetivos econômicos, sociais e humanos fazem parte de uma só finalidade e destinação do homem. Mas isso não justifica confundir os métodos e desvirtuar instituições.

É natural, dado o carácter de guerra civil do confronto entre as duas Superpotências, que as idéias e concepções sobre organização social, econômica e política da que saiu vencedora do conflito passem a ter um poder de atração muito maior e tendam a generalizar-se, mesmo levando-se em conta a variedade e complexidade das situações nacionais. Já nos referimos a essa tendência. É oportuno advertir, porém, que o homem não pode ser reduzido, em suas preocupações, em sua luta e esforços diversos, a uma única inspiração ou estímulo à ação. Nem a democracia liberal e a democracia representativa, nem o socialismo, nem os direitos do homem ou a preservação do meio ambiente, nem o desenvolvimento econômico e a elevação do nível de vida dos pobres pode explicar a totalidade do homem e de sua ação. Hoje, nem sequer mais a religião ou alguma teoria pseudo-científica podem fazê-lo. Daí a dificuldade de harmonizar mesmo aqueles objetivos que são, hoje, tidos por universalmente comuns. Mas, para evitar resultados contrários aos princípios em ascenção é preciso harmonizá-los, especificar os métodos adequados a cada um, ver como uns propiciam outros, etc...

O exemplo corrente cá está. Não se pode pretender alcançar padrões eficazes de defesa do meio ambiente ou de respeito aos direitos do homem sem cuidar do desenvolvimento, nem vice-versa. Não são os fatos e os avanços em um campo que determinam o que acontecerá nos outros. Todos se influem mutuamente e essa interrelação gera dificuldades enormes para definir princípios e normas que devam regular cada um deles sem prejuízo dos demais. Não é tarefa só de juristas, mas de mentes polifacéticas, de experiência acumulada na solução, em alto nível, de problemas complexos, de definição e solução multidisciplinar.

Outra avaliação de tendências que tem sido muito popular é a referente a uma suposta decadência da idéia de soberania nacional, em face da crescente interdependência internacional, principalmente em termos econômicos. Ora, nosso tempo se caracteriza, concomitantemente, também por uma afirmação de identidades nacionais e ciosa defesa da soberania.

Essa aparente contradição é explicável, pois ambas as afirmações podem ser ilustradas com exemplos. A relativa à redução da soberania agrada muitas vezes aos juristas por parecer necessária à maior efetividade do direito internacional. Logicamente, há que ver os limites a tal redução pois, por definição, a sobrevivência da soberania é o próprio pressuposto do direito internacional.

Alguns vêem essa tendência afirmar-se nos processos de integração regional. Acontece, de fato, que, na medida em que progride a integração, os órgãos supranacionais criados pelo direito comunitário subtraem aos Estados membros a soberania, ou as competências finais, sobre diferentes setores da atividade interna. Em nenhum caso, porém, a personalidade jurídica internacional dos Estados membros desapareceu, pois, os Estados em processo de integração não perderam a competência exclusiva de determinar sua política de representação externa e sua política de defesa. A organização mais próxima da integração, a Comunidade Européia, ainda não chegou lá, como se viu no encontro de Maastrich, embora já tenha admitido decisões por maioria, mesmo nesses setores, quando se trata de medida de execução ou processual. Uniformidade de política externa e defesa ainda é meta a alcançar, havendo pelo momento apenas esforços de coordenação intergovernamental nesses setores.

A interdependência real não impede a crescente afirmação das identidades nacionais, fora dos processos federativos, integracionistas, como se verifica na "criação" de novos Estados e nacionalidades no Leste europeu, ou na dissolução da Iugosláveia. Quando desaparece um Estado, surgem outros com as mesmas características de sujeitos de direito internacional com atributos soberanos. O que se vê é a forte afirmação da idéia nacional como fonte de Estados e ideologia capaz de sobrepor-se a outras, univeralistas. Naturalmente, há um limite político à aplicação do princípio de auto-determinação. Os Estados defendem sua sobrevivência contra forças desagregadoras. Mas se vê até mesmo nas velhas nações européias, em uma época em que procuram unir-se em nova entidade mais ampla, o renascer de regionalismos há séculos suprimidos.

Na Espanha, os casos do país basco e da Catalunha; na França, a Córsega e a Bretanha; na Grã-Gretanha, a Escócia e, em grau menor, o País de Gales; na Itália, o aparecimento em recentes eleições de uma Liga Lombarda preconizando a recomposição do país em forma federal, com três divisões, norte, centro e sul. Cabe não exagerar essas situações que provavelmente evoluirão sem ruptura das unidades nacionais vigentes. Prevalecerão provavelmente simples soluções democráticas de autonomia.

Mesmo na África, ond as fronteiras foram consideradas sacrossantes, inclusive pela Organização da Unidade Africana, surgem idéias novas. Naquele continente a abertura de questões de limites levaria provavelmente a guerras intermináveis, porque freqüentemente as etnias estão a cavaleiro das fronteiras.

Não é que haja quem pretenda rever as fronteiras naquele continente. Mas, há idéias de dar mais autonomia, deixar aflorar mais afirmativamente a identidade própria de cada etnia, dentro da estrutura estatal, mesmo que se criem mais fortes vínculos multinacionais por tais etnias dispersas. A respeito, há um interessante artigo, na edição

anual "America and the World" da revista "Foreign Affairs", de autoria de Michael Chege. Depois de se referir ao fato de que os Governos africanos sempre seguem a política de suprimir o que chamam impropriamente de "tribalismo", como meio inevitável de criar e solidificar os novos Estados em termos de uma nacionalidade, o autor procura explicar que o reconhecimento da diversidade subnacional teria um efeito positivo. Diz ele: "Africa must learn to live with its fissiparous subnationalism and ethnic diversity. 'Tribalism' indeed is an issue that calls for further reflection among African political reformers seeking to recast the social bases of their governments. Governments in sub-Saharan Africa have long repressed ethnic interests, centralized power and economic resources supposedly to promote a new "integrated" national consciouness. Their critics now demand proportional ethnic representation and an end to nepotism as the high road to the same elusive national unity... African states may now have to try a formula for stability and equity that disaggregates centralized power, allows freedom of association, including ethnic organization, and in particular promotes federalism".

Seria, pois, a emergência à face política do Estado das variadas realidades nacionais submersas. O autor evidentemente se refere à preservação dos Estados existentes dando-lhes uma forma federal.

É preciso, por outro lado, do ponto e vista do direito, não avaliar os processos de integração e o direito comunitário, que surge em tais processos, como um sinal da decadência do direito internacional, ou como uma normatividade que lhe seja oposta. Se os processos de integração se verificarem em todo o mundo, na base de continentes ou grandes agregados de países, as unidades supranacionais assim formadas continuarão a reger-se em suas relações umas com as outras pelo direito internacional, que seria então mais necessário do que nunca.

O direito comunitário tem sua origem em tratados institucionalizantes, regidos pelo direito internacional. Na operação de tais tratados, órgãos ali previstos como tendo poderes supranacionais ou os próprios Estados Membros, por interpretação ou diferente formas de entendimento e cooperação, criam o direito comunitário.

A respeito da diferença jurídica entre a simples cooperação intergovernamental e o direito comunitário de integração há o texto muito simples e claro de um colega meu na Comissão Jurídica Interamericana, Jorge Reinaldo A. Vanossi, argentino, em seu relatório sobre aspectos constitucionais em processos de integração:

> "El interrogante de si hay un conflicto entre esa supranacionalidad o ese derecho comunitario y la soberania, y si éstos son términos que están evidentemente en colisión o no tan evidentemente, es uno de los problemas de índole política constitucional que requiere ser abordado.
>
> La idea de supranacionalidad implica, ante todo, interdependencia y, en consecuencia, debe ser tomada con esa connotación y no con la prevención (que es más animadversión) de sostener que la supranacionalidad o el derecho comunitario son una pérdida en sentido negativo y peyorativo de todas las virtudes derivadas de la calidad soberana de los Estados Miembros.

> Por lo pronto, todo organismo comunitario, por más tibio que sea el ensayo y por más tímida que sea la cuestión, pone fin a una total autodeterminación. Y si soberano es aquél que está exento de control, si por soberanos entendemos a una persona, a un ente o una situación sobre la cual no puede recaer un mecanismo de control que surta efectos limitativos, entonces debemos decir que la concepción clássica de la soberania es una concepción que está en la página de los libros, pero que ya no se corresponde con la realidad interdependiente del mundo contemporáneo. Además tenemos que recordar, a manera de agregado en esta reflexión, que se es también soberano cuando se delega, desde el modesto contrato que celebran dos particulares en el ejercicio de la autonomia de la voluntad, hasta las altas contrataciones que celebran los Estados en el orden internacional; ya que precisamente porque contratan, celebran tratados y porque delegan a través de los contenidos de esos contratos, es porque están demonstrando un ejercicio soberano de la autonomía de su voluntad (en el caso que nos interesa, de su autonomía política)."

É da essência da soberania a competência exclusiva de criar o direito, mas não, necessariamente, a de não aceitar qualquer limitação.

Em nosso continente, evidentemente, a OEA é uma organização intergovernamental e não integracionista, apesar de os artigos 41, 42 e 43 da Carta se referirem a um objetivo de integração entre os Estados em desenvolvimento da região. Trabalha-se hoje, inclusive na Comissão Jurídica Interamericana, no exame de normas e mecanismos que facilitem tal objetivo. A "iniciativa para as Américas" visa ao livre comércio e não propriamente à integração. A Carta apresenta, entretanto, dispositivos que parecem cercear a própria essência da soberania dos Estados membros. No elenco de considerações lá está dito que os Estados americanos estão "seguros de que a democracia representativa é condição indispensável para a estabilidade, a paz e o desenvolvimento da região". Entre os propósitos estabelecidos no artigo 2º está "b) Promover e consolidar a democracia representativa, respeitado o princípio da não-intervenção." No artigo 3º, relativo aos princípios, lá está a afirmação (letra d) de que "A solidariedade dos Estados americanos e os altos fins a que ela visa requerem a organização política dos mesmos, com base no exercício efetivo da democracia representativa".

São dispositivos todos de ordem geral, sem o complemento de dispositivos operacionais específicos ou de medidas de execução. Portanto, em si mesma, a Carta não define uma restrição à soberania dos Estados, que seria da maior importância e, na verdade, implicaria a transformação dos Estados membros em entidades não soberanas, porque é uma restrição à própria essência da vida interna.

Foi necessário, então, ressalvar na própria Carta que tal não era a intenção. Por isso, a alínea e, do mesmo artigo 3º, estabelece que "Todo Estado tem o direito de escolher seu sistema político, econômico e social, sem ingerências externas, bem como de organizar-se da maneira que mais lhe convenha, e tem o dever de não intervir nos assuntos de outro Estado", etc... Entre os direitos e deveres dos Estados, o artigo 16 reconhece que podem eles desenvolver sua vida interna livremente, mas com a restrição

do respeito aos direitos do homem. O artigo 18 sobre não intervenção é dos mais enfáticos: "Nenhum Estado ou grupo de Estados tem o direito de intervir, direta ou indiretamente, *seja qual for o motivo*, nos assuntos internos ou externos de qualquer outro. Este princípio exclui não somente a força armada, mas também qualquer outra forma de interferência ou de tendência atentatória à personalidade do Estado e dos elementos políticos, econômicos e culturais que o constituem". Há quem procure estabelecer que a ação da própria OEA não é intervenção, quando endereçada ao cumprimento das obrigações da Carta. Acontece, porém, que a Carta define as circunstâncias em que a Organização pode agir, não cabendo extrapolações.

Há evidente dificuldade de harmonizar dispositivos que asseguram a plena soberania, auto-determinação e não-intervenção, por um lado e, por outro, o reconhecimento de que a democracia representativa é o regime que deve prevalecer. Não mencionarei aqui os esforços intelectuais abundantes que políticos e juristas têm dispendido para encontrar o ponto de equilíbrio entre textos aparentemente contraditórios, inclusive trabalhos apresentados na Comissão Jurídica Interamericana. Tal ponto de equilíbrio ou de harmonia será definido, conforme a evolução política no Continente, e não por elucubrações individuais.

O ponto mais alto operacional em matéria de promoção da democracia representativa foi atingida na XXI Sessão da Assembléia Geral da OEA. Aproveitando a circunstância feliz e rara de que todos os Estados membros tinham, naquele momento, regimes democráticos, os Ministros das Relações Exteriores e Representantes especiais presentes assumiram "compromisso político" com a democracia representativa e os direitos do homem, no chamado "Compromisso de Santiago". No primeiro parágrafo da parte declaratória o compromisso é estatuído, com a ressalva do "respeito aos princípios da livre determinação e não intervenção". No penúltimo parágrafo expressam os Ministros sua "determinação de adotar um conjunto de procedimentos eficazes, oportunos e expeditos para assegurar a promoção e defesa da democracia representativa, de conformidade com a Carta da OEA". Em conseqüência, adotam a Resolução AG/Res.1080 (XXI-0/91), que estabelece um mecanismo operacional para dar efetividade à intenção de promover e consolidar a democracia representativa. O Conselho, por solicitação do Secretário-Geral, se reúne quando houver interrupção do processo democrático. O Conselho "examina a situação", no quadro da Carta, e decide convocar uma reunião ad hoc de Ministros das Relações Exteriores ou uma sessão extraordinária da Assembléia Geral.

O mecanismo proposto ressalva claramente que a análise dos fatos e as decisões que se tomem serão conformes à Carta e ao direito internacional.

Sem dúvida, a discussão, de uma questão interna tão importante, por um órgão internacional representa intervenção e submissão a esse órgão de um aspecto essencial da soberania, o que só poderia resultar de tratado formal, devidamente ratificado. Daí a ambigüidade do processo previsto na Resolução de Santiago. O simples fato de o Conselho, por uma resolução política, examinar a situação interna de um Estado membro e decidir o que fazer a respeito já representa um elemento de pressão considerável, criado por um instrumento declaratório, não ratificado. Daí a preocupação do texto em ressalvar a Carta e o direito internacional.

Na prática, há uma forma de interferência e mesmo de intervenção, formalmente, que procura evitar tal qualificação ao cingir as medidas tomadas à forma mais suave de interferência: apela, deplora, interpõe bons ofícios. No caso do Haiti, verdadeiras sanções foram impostas com a cobertura política da Organização. Importante ainda foi a decisão de não aceitar na OEA representantes do Governo de fato do Haiti.

A prática dirá como evolui essa normatividade ambígua, ambígua quanto à sua validade jurídica e ambígua ante as contradições da Carta, que não podem ser ab-rogadas por uma resolução. Estamos todos de acordo porque o objetivo é desejado e por isso haverá um efeito prático positivo. De qualquer forma, Santiago não é um começo provocado pelo fim da guerra fria, mas a conseqüência de um processo democratizante que lhe é anterior e que continuará. É possível que as soluções do Compromisso de Santiago adquiram solidez pela sua adoção eventual em tratado devidamente ratificado ou por sua convalidação na prática, em sua aplicação reiterativa, como um costume considerado pelos Estados como de direito obrigatório. Logicamente, o requisito do caráter democrático dos Estados Membros poderia implicar, pelo menos, as de seu direito de participação nas atividades da organização quando tal requisito não é atendido. Nesse sentido, a XXII Sessão da Assembléia Geral, da O.E.A. realizada em maio último nas Bahamas, aprovou resolução que incumbiu o Conselho Permanente de decidir sobre a convocação de uma Assembléia Geral Extraordinária para considerar a possível incorporação na Carta da Organização de novos textos referentes à possibilidade de suspender governos de Estados Membros onde ocorra a interrupção abrupta ou irregular da ordem democrática. A mesma resolução se refere à necessidade de enfrentar a pobreza crítica na região, definida como uma das mais graves ameaças à democracia. O Conselho já criou uma comissão especial encarregada de propor as reformas de textos, tarefa que suscita vários e complexos aspectos jurídicos. Havendo a reforma da Carta, é óbvio que não se colocaria em dúvida o caráter obrigatório dos dispositivos.

Algumas conclusões provisórias se seguem, apesr da fluidez da conjuntura internacional.

1. A estrutura internacional pós-guerra fria, embora tenha uma aparência unipolar, é mais complexa do que isto, e não altera fundamentalmente a natureza do direito internacional como regulador de relações entre Estados soberanos e iguais.

2. A ordem vigente, em matéria de paz e segurança, de âmbito mundial, continua a estar baseada na Carta das Nações Unidas.

3. Para dar eficácia à proteção de certos objetivos louváveis, há uma tendência a utilizar os poderes do Conselho de Segurança da O.N.U. e das instituições financeiras internacionais para a promoção de tais objetivos de forma excessiva e até predominante, que leva a estender a desigualdade funcional dos Estados a outras áreas, além daquelas para que foram criadas.

A especificidade de tais organismos, entretanto, não exclui, por exemplo, que o Banco Mundial peça estudos de impacto ambiental dos projetos ou, mais positivamente, que financie projetos de interesse ecológico. Mas seu papel central é o desenvolvimento econômico.

4. Em conseqüência, cumpre evitar tais distorções na medida em que favorecem a prevalência de decisões unilaterais.

5. Os objetivos que justificariam tais distorções, como o respeito aos direitos do homem e a preservação do meio ambiente, devem ser tratados por meios e instituições próprias, específicas, embora se aceite que todos esses objetivos estão interligados entre si, permeiados por considerações de segurança e de desenvolvimento econômico e social.

6. Há uma crescente coincidência no tempo entre fatos aparentemente contraditórios: a crescente interdependência econômica, os movimentos de integração de vocação supranacional e uma onda de nacionalismo que, em alguns países, toma a forma de racismo e xenofobia. O nacionalismo, porém, não chega a destruir os processos de integração, que resultam na criação de novos Estados continentais ou federais que absorveriam, ao fim do processo, os Estados envolvidos. Por outro lado, o nacionalismo provoca, em uma primeira fase, o aumento do número de Estados soberanos. Os dois processos não são incompatíveis e ocorrem lado a lado, por longo tempo, além do futuro previsível, mas haverá sempre relações entre megaestados, compostos, e/ou Estados novos, resultantes da dissolução de grandes Estados. E tais relações serão reguladas por um direito internacional, mais importante e necessário do que nunca.

7. A lógica da situação deveria levar à criação de métodos imparciais, judiciários ou quase, para a solução de controvérsias de natureza penal, ou relacionadas com outros objetivos comuns de cooperação.

8. Deveria levar também, mas não se nota qualquer progresso nesse sentido, à revigoração e expansão da cooperação econômica em favor dos países em desenvolvimento, pois, excluídas as razões estratégicas decorrentes da competição ideológica no Terceiro Mundo, aí estão a imigração descontrolada, o narcotráfico e riscos de recuo no processo de democratização, sobretudo na América Latina, fatos todos que refletem a pobreza e colocam o problema da cooperação para o desenvolvimento na ordem do dia, mesmo que os ricos não gostem. Poderia desenvolver-se numa forma de cooperação em que os subdesenvolvidos cooperariam essencialmente com obrigações de fazer, como parece próximo de acontecer no campo ecológico.

9. Em resumo, a evolução das relações internacionais, sobretudo depois da guerra fria, tende sem dúvida a estimular formas de cooperação mais eficazes para a obtenção de certos fins que, em conseqüência, resultam num crescente aumento das restrições ou condicionamentos da soberania. O essencial, porém, é que tal evolução se faça na base da negociação entre Estados soberanos e iguais e de forma a desenvolver instituições e instrumentos imparciais, sem imposições unilaterais. É essencial evitar que os poderosos, em concerto, queiram impor soluções ou comportamentos. O concerto das grandes potências deve servir para assegurar um clima de paz, segurança e cooperação, que propicie a evolução natural.

DOCUMENTOS

A - DESENVOLVIMENTO E SOBREVIVÊNCIA COLETIVA

Inga Thorson*

A matéria a ser abordada versa sobre sobrevivência coletiva, porque sem sobrevivência coletiva não haverá desenvolvimento.

Pertencemos à primeira geração da humanidade que deve deparar-se com sérias ameaças à sua própria sobrevivência. Duas dessas ameaças são, ou deveriam ser, bem conhecidas. As duas ameaças destruidoras da sobrevivência humana são a corrida armamentista nuclear e o processo contínuo de destruição do meio-ambiente.

Antes, porém, de tratar mais amplamente essa matéria, abordarei conceitos mais gerais e bem simples.

Dois conceitos começam a penetrar em nosso pensamento, no que tange às características de problemas cruciais que ameaçam nossa sobrevivência:

- a natureza global dos problemas;
- conceitos comuns.

O fato exige a percepção da necessidade de uma mudança em direção a novo pensamento global o que será difícil, mas ao mesmo tempo urgente. Entretanto, a compreensão dessa necessidade ainda encontra-se tragicamente, principalmente entre as lideranças políticas das nações em todo o mundo.

Exemplos são facilmente encontrados. Se houvesse compreensão e vontade política, esta geração da humanidade não precisaria defrontar-se com problemas tais como:

- a crise econômica mundial e seus desdobramentos, tais como: inflação, desemprego, o peso da dívida externa, ausência de equilíbrio no comércio internacional e problemas monetários internacionais;

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– a falta ameaçadora de recursos, principalmente os não renováveis, e energia;
– a destruição a curto e a longo prazo do meio-ambiente;
– o contínuo aumento da população;
– a perigosa disparidade, moralmente e politicamente inaceitável, existente entre os ricos e os pobres;
– a corrida armamentista e seus efeitos econômicos e sociais negativos.

As relações entre esses problemas globais implicam que, enquanto eles permanecem insolúveis, há um fortalecimento recíproco dos seus efeitos negativos para o nosso futuro. Mas eles nunca serão solucionados através de confrontos e conflitos, mas somente através de compromisso e cooperação. O bem conhecido e freqüentemente citado problema que constitui, tanto o motivo para as ameaças de sobrevivência, que eu acabei de citar, como também um obstáculo para a necessidade urgentemente desejada de mudança do comportamento político, é o atraso do pensamento humano comparado à aceleração do desenvolvimento tecnológico. Todos nós conhecemos a famosa declaração de Einstein:

– a separação do átomo transformou tudo, salvo nossa maneira de pensar e, por isso, nós caminhamos para uma catástrofe incomparável.

Alguns anos mais tarde, durante a Conferência Internacional sobre Transportes Aéreos, em Copenhague, em 1960, o brilhante poeta dinamarquês Piet Hein disse:

– somos cidadãos globais com almas tribais.

Sim, na verdade, desde que foram proferidas essas palavras, há quase trinta anos, adquirimos mais conhecimento técnico e nossos métodos de vida sofreram uma verdadeira revolução – pelo menos no mundo industrializado. Porém, o pensamento permaneceu o mesmo: não há novo conceito, nenhuma redefinição de conceitos antigos em relação a, por exemplo, segurança. Esta é uma prova de decrepitude considerável dos líderes políticos e do ser humano em geral. Nossa existência foi internacionalizada, porém não nossas ações políticas. E os resultados? Permitam-me citar o parágrafo final de Declaração sobre Desarmamento e Desenvolvimento de abril de 1986, que foi parte do processo preparatório para a Conferência Internacional sobre a Relação entre Desarmamento e Desenvolvimento em agosto/setembro de 1987.

Nosso pequeno planeta corre perigo: através dos arsenais de armas que poderiam explodí-lo, através do ônus de dispêndios militares que poderiam afundá-lo, e através das necessidades básicas não atendidas em 2/3 de sua população, que sobrevivem com menos de 1/3 de seus recursos.

Pertencemos a uma comunidade universal que acredita termos tornado emprestado esta Terra de nossos filhos da mesma maneira que a herdamos de nossos antepassados. A capacidade de "carga" da Terra não é infinita, tampouco seus recursos. As necessidades de segurança são legítimas e devem ser encontradas. Devemos, porém, permanecer como testemunhas inúteis de um lançamento em direção a uma maior insegurança com custos ainda mais altos?

A citação, tirada da Declaração sobre Desarmamento e Desenvolvimento, ressalta diretamente o impacto da corrida armamentista, em termos quantitativos e qualitativos, e nossas possibilidades de sobrevivência e desenvolvimento.

Quais são, então, os fatores da corrida armamentista, seu volume e seu papel no contexto de possibilidades para o desenvolvimento econômico, social e humano?

Acho que todos nós temos conhecimento desses dados. Permitam-me, somente para referência, repetí-los ligeiramente:

O nível dos dispêndios militares globais perfazem quase 1.000 bilhões de US$ dólares. Isto implica em um aumento real, em termos mundiais, de gastos militares, entre quatro a cinco vezes maiores, desde o fim da 2a Guerra Mundial. Os atuais gastos militares apresentam-se bem acima de 5%, quase 6-8% do produto mundial total e são mais que 25 vezes maiores do que os gastos com ajuda prestada aos países em desenvolvimento. E durante os anos 80, os gastos militares globais cresceram, em média, em uma faixa mais acelerada do que durante a segunda metade dos anos 70.

Além disso, tem-se reconhecido, em escala progressiva, não somente através das Nações Unidas – assunto que retomarei mais adiante – que o conceito de "segurança" por trás senão de todas, pelo menos de uma grande parte do uso extraordinário de recursos mundiais para fins militares, está se esvaziando, em conseqüência da progressiva interdependência entre as nações, em tal extensão, que a necessidade de segurança mais premente de nossos tempos seria uma redefinição total do conceito de "segurança" assunto que abordarei mais tarde.

Dentro do quadro geral dos gastos militares, há algumas tendências que são importantes em suas implificações, tanto no que diz respeito à corrida armamentista quanto aos seus efeitos para o desenvolvimento. Essas implicações carregam um mau presságio, não somente para o aspecto de sobrevivência, como também no que diz respeito à utilização de recursos e ao desenvolvimento.

Em primeiro lugar, há os recursos dedicados à pesquisa para fins militares. Devo destacar o aspecto participar do desenvolvimento e gastos militares, devido ao seu impacto ameaçador para o desenvolvimento econômico e social. Isso foi documentado em vários trabalhos universitários, destacado aqui o trabalho de Murek Thee, pesquisador do PIRIO, que foi distribuído durante uma Convenção Internacional nos EUA.

Ruth Leger Sivard declara que a marcha veloz e desenfreada da tecnologia armamentista conduziu ao que ela denomina de "a revolução na arte de fazer guerra". Utilizei esta declaração para falar de um dos mais influentes e cruciais – poderia até referir-me a ele como o mais crucial e influente – ingrediente da corrida armamentista, onde também a predominância dos países desenvolvidos é bem aparente.

No que diz respeito à pesquisa e desenvolvimento, permitam-me citar algumas cifras, extraídas do trabalho do Marek Thee: enquanto os países desenvolvidos têm 2.875 cientistas e engenheiros por milhão de habitantes, a cifra dos países em desenvolvimento

é de 121. Em termos percentuais, isso significa que 94% dos cientistas do mundo moram e trabalham nos países desenvolvidos, restando somente 6% para os países em desenvolvimento. Como são usados esses recursos intelectuais predominantes nos países desenvolvidos? Outros pesquisador do Worldwatch Institute de Washington formula a questão da seguinte maneira: a manutenção da máquina militar mundial é então a principal ocupação da pesquisa e desenvolvimento mundiais. Várias estimativas têm sido feitas em relação ao volume dos gastos e capacidade humana envolvidos na pesquisa e desenvolvimento militares. Poderia resumir essas estimativas citando o Professor Skolnikoff do MIT, que diz: em 1987 – dos fundos destinados à pesquisa e ao desenvolvimento em termos mundiais uma estimativa razoável e provavelmente conservadora – é que 1/3 a 1/2 são dirigidos direta ou indiretamente para a segurança militar.

No que se refere à divisão geográfica, várias estimativas parecem concordar em que os maiores gastos em pesquisa e desenvolvimento militares pertencem aos EUA, URSS, República Federal da Alemanha, França, Reino Unido e China, sendo os Estados Unidos e a União Soviética responsáveis por 90 a 95% do total desses gastos, e que em meados dos anos 80 atingiu 80-84%. E em 1986, a quota destinada à pesquisa e ao desenvolvimento militares, provinda do Governo Norte-Americano, atingiu 72,7%.

Algumas cifras, que demonstram esse crescimento durante a última década, poderiam ser citadas: estima-se que os gastos reais em pesquisa e desenvolvimento militares aumentaram em média 1% ao ano, de 1974 a 1980 de 5 a 8% de 1980 e 1983, e em mais de 10% de 1983 a 1984. Como essa última cifra é maior do que o acréscimo em gastos militares como um todo, os gastos com pesquisa e desenvolvimento para fins militares aumentaram a sua proporção dentro dos gastos militares.

Poderia ser lembrado que a demanda de pessoal – 20% do número total de cientistas, sendo que nos EUA a precentagem estimada é de 35% – demonstra que mudança tecnológica no setor militar apresenta uma maior escala em termos de pessoal do que o contingente corresponde no setor civil; ela exige muito mais – uma estimativa de 20 vezes mais – do que pesquisa e desenvolvimento no setor civil, que assim se priva de talentos para a modernização e inovação.

As tendências que são aparentes – e eu poderia citar muitas outras cifras – refletem a mudança no que Marek Thee denomina de centro de gravidade de armamentos: de uma competição em termos de quantidade de armas para uma rivalidade na tecnologia militar de base científica. A superioridade qualitativa tornou-se um objetivo central da corrida armamentista.

Aqui caberia chamar a atenção para a euforia que poderia decorrer do Tratado de Armas Nucleares de Alcance Médio – INF – entre os EUA e URSS, e o provável próximo 4o Encontro de Cúpula:

– Ao reduzir-se quantitativamente os sistemas armamentistas, cria-se a impressão de uma descontinuidade na corrida armamentista;

– Ao aperfeiçoar-se a qualidade, há, na verdade, uma escalada na corrida armamentista.

O fato é que bem independentemente do Tratado INF, e conforme declarado na revista "US News and World Report", "a partir dos próximos três anos, aproximadamente, 50 grandes sistemas armamentistas passarão de protótipos à produção...".

Abordei em tal extensão a amplitude e os efeitos da pesquisa de natureza militar porque estou de acordo com a opinião generalizada de que tal pesquisa tem implicações negativas no desenvolvimento econômico e social – e, mesmo, para a sobrevivência, a sobrevivência coletiva.

Alguns economistas (entre eles, Marek Thee) demonstram que, por uma variedade de razões, a atuação da alta tecnologia exigida para o produto militar não se ajusta à indústria civil. Isso constitui um sério desfalque para as economias de todos os países, desenvolvidos e em desenvolvimento. Para citar o Professor Lloyd J. Dumas, da Universidade do Texas: "A utilização de recursos produtivos para propósitos não-produtivos constitui um desgaste da vitalidade e da prosperidade de qualquer economia". Entre as economias desenvolvidas, a diferença entre os Estados Unidos, de um lado, e o Japão e República Federal da Alemanha de outro, é visível: no período de 1982-1984, os Estados Unidos gastaram com pesquisa e desenvolvimento de caráter militar, 0,80% de seu PNB, enquanto que o Japão gastou 0,01% e a RFA 0,11%. De outro lado, enquanto os Estados Unidos mostraram uma alta preponderância da pesquisa e desenvolvimento de caráter militar sobre a pesquisa e desenvolvimento de interesse civil, o Japão e a República Federal da Alemanha mostraram uma enorme preponderância em pesquisa e desenvolvimento civis sobre os recursos governamentais dedicados à pesquisa e desenvolvimento de uso militar. Isso contribui para a grande redução na capacidade de competição dos Estados Unidos nos mercados internacionais, lucrando o Japão e a República Federal da Alemanha. Não é de admirar que a revista "US News and World Report" tenha publicado a matéria econômica, em 1987, entitulada: "Continuarão os Estados Unidos a ser o número um? ("Will the US Stay Number One?").

A atual difícil situação econômica dos Estados Unidos tem muitas raízes. Porém – entre outras – Marek Thee aponta a militarização da economia e da tecnologia como uma de suas principais.

O propósito da Conferência da SID – "Society for International Development" é, entretanto, enfatizar particularmente os problemas impostos aos países em desenvolvimento pelo uso e abuso da ciência e da tecnologia. Isso bem contribui para sustentar a polarização do desenvolvimento econômico entre o Norte e o Sul. Marek Thee se referiu aos diversos fatores estruturais relacionados com o funcionamento da pesquisa e desenvolvimento de interesse civil e de interesse militar, em uma escala global, e no qual repousa o subdesenvolvimento básico do Terceiro Mundo, criando-se um patamar provavelmente impossível de ultrapassar num futuro previsível, a menos que seja empreendida uma transformação radical da ordem econômica e militar mundial.

Ocupando o primeiro lugar entre aqueles problemas está a má distribuição de recursos humanos e materiais dedicados à pesquisa e ao desenvolvimento entre o Norte e o Sul. E como o total global de pesquisa e desenvolvimento é dominado por alta tecnologia em pesquisa e desenvolvimento de interesse militar, e orientado para demandas militares e

industriais dos países desenvolvidos, constata-se que há pouco interesse nos problemas de desenvolvimento do Terceiro Mundo.

Como última citação do brilhante trabalho de Marek Thee: "o impacto sinérgico da distribuição global de pesquisa e desenvolvimento, reforçado pela penetração das pesquisas e desenvolvimento de interesse militar em certos países do Terceiro Mundo deve ser, visto dentro do contexto das grandes desigualdades em capital e capacidade científico-tecnológicas entre o Norte e o Sul. Isso reforça e agrava a polarização do desenvolvimento e do bem-estar entre os países desenvolvidos e os países em desenvolvimento.

Permitam-me agora lembrar o fato de que vários países em desenvolvimento por diversas razões (que não pretendo analisar aqui), têm incorrido, crescentemente e, até recentemente, em ônus militares que afetam negativamente sua necessidade urgente de desenvolvimento econômico e social. Mas, é importante notar que o ônus que recai sobre os países em desenvolvimento temduas raízes diferentes: os gastos militares desses próprios países; e os efeitos negativos na economia mundial da crescente militarização do mundo – que continua crescendo, apesar dos encontros de cúpula, do Tratado INF, etc. – os quais constituem um fator importante na crise econômica do Terceiro Mundo, que afeta os países em desenvolvimento e seus povos, muito mais que os países do Norte.

Isso já foi explicitamente registrado no Relatório, em 1981, do Grupo de Técnicos Governamentais sobre a Relação entre Desarmamento-Desenvolvimento, das Nações Unidas, aprovado pela Assembléia Geral em 1982. E vários relatórios sobre pesquisa submetidos ao Grupo mostraram os crescentes gastos militares, isto é, um processo de militarização tende a ser relacionado, com menor investimento, impostos maiores, cortes no consumo e nas despesas com o bem-estar social, e inflação.

Os cortes nos gastos em bem-estar social – e em educação – por esse motivo, produzem efeitos sociais negativos consideráveis, em termos sociais e humanos. Em um relatório para o Grupo das Nações Unidas, os economistas americanos Bruce Russetts e David Sylvan estimaram, através de um modelo econométrico, vários custos que poderiam ser utilizados em benefícios sociais e que foram desviados para a compra de armamentos. Eles verificaram que, para um país em desenvolvimento médio, com uma população de 8,5 milhões, de renda per capita de US$ 350 (valor de 1970), os primeiros 200 milhões gastos em importação de armas equivalem a 20 mortes adicionais de crianças para cada 1.000 nascidos; diminuem a expectativa média de vida de 3 a 4 anos; e 13 a 14 adultos a menos são alfabetizados em cada 100 habitantes da população adulta.

É naturalmente importante notar aqui os efeitos do processo de militarização no ônus da dívida externa dos países em desenvolvimento. Em estudo que preparei para o Governo Sueco, há poucos anos, constatou-se que a importação de armas é responsável por cerca de 25% do ônus de dívida dos países do Sul. Outra estimativa, contida no relatório de 1985 da ONU sobre a Situação Social Mundial indica que, em pelos menos quatro dos 20 países que possuiam as maiores dívidas externas em 1983, o valor das importações de armas representou cerca de 40% ou mais, do crescimento da dívida entre 1975 e 1980.

Todos sabemos que a disparidade entre países ricos e países pobres está aumentando, inter alia, através de transferência líquida de recursos financeiros dos países em desenvolvimento para os países industrializados, como um resultado da crise da dívida. Os últimos dados de que disponho, de junho de 1987, demonstram – de acordo com um Relatório do Secretariado Executivo da Comissão Econômica da África nas Nações Unidas – que o continente africano recebeu em 1986 cerca de 15 bilhões de dólares em ajuda financeira, enquanto perdia cerca de 9 bilhões de dólares, em redução de preços nos produtos exportados 16 bilhões de dólares em encargos de dívida.

Dessa maneira – e para citar mais uma vez a Declaração sobre Desarmamento e Desenvolvimento da ONU – ninguém deve ficar surpreendido com o fato de que dezenas de países em desenvolvimento perderam uma década ou mais de desenvolvimento, e que algumas conquistas econômicas e sociais obtidas nos últimos vinte anos correm perigo de se perder. Os países mais severamente afetados não estão mais em condições de prover às necessidades básicas de suas populações, tais como alimento, água potável, assistência médica ou educacional, e muito menos em condições de dedicar recursos adicionais para desenvolvimento.

Na Declaração, a situação é resumida nas duas seguintes sentenças:

– Condições econômicas rigorosas, fome, pobreza e instabilidade política são aliados naturais. Ignorar as implicações maiores desses aspectos pode muito bem significar distorsão fundamental dos problemas de nossa época.

Permita-me citar o seguinte parágrafo da Declaração:

– Na medida em que uma realocação de parte dos recursos liberados, através de medidas de limitação de armas e desarmamento, cria recursos adicionais para o desenvolvimento, o desarmamento poderia transformar-se numa importante contribuição para o desenvolvimento. Como o desenvolvimento ajuda a superar ameaças não militares ao bem estar nacional e segurança, favorecendo um sistema internacional mais estável e permanente, pode contribuir para um mundo mais seguro. A relação entre desarmamento e desenvolvimento necessita ser buscada dentro de uma rede de interdependência global. Atualmente, não há somente uma interdependência crescente entre as nações, mas também a interdependência crescente de problemas.

Muitas pessoas conhecem a série de excelentes relatórios sobre Dispêndios Militares e Dispêndios Sociais Mundiais, da economista americana Ruth Leger Sivard, que já citei. Cada um deles começa com o que ela denomina de Prioridade. Permitam-me citar algumas delas:

– Há um soldado para 43 pessoas no mundo, um físico para 1.030 pessoas;

– Custa US$590.000 por dia para operar uma aeronave, e todo dia morrem de fome, ou por motivos causado pela fome, 14.000 crianças na África;

– O orçamento militar anual mundial é igual à renda de 2,6 bilhões de pessoas nos 44 países mais pobres.

E no último relatório para 1987-88, ela dá os seguintes exemplos de alternativas para utilização de recursos ora destinados a fins militares;

– A pesquisa "Guerra nas Estrelas", no ano fiscal de 1988 – corresponderia a escolas primárias para 1.400.000 crianças na América Latina;

– Um submarino ("Tridente" US$ 1,5 bilhões) corresponderia a 5 anos de programa para imunização de crianças contra 6 doenças fatais, evitando 1 milhão de mortes por ano;

– Dois aviões de combate (tipo JA 37) no valor de US$ 45 milhões de dólares corresponderiam à instalação em países do Terceiro Mundo de 300.000 bombas de água manuais para dar acesso à água potável nas aldeias desses países.

E não deveríamos pensar que os efeitos negativos do processo de militarização estão limitados aos povos do Terceiro Mundo. Eles são sentidos também pelos povos das maiores potências militares. De acordo com Ruth Leger Sivard, os Estados Unidos, embora sejam a potência militar número um do mundo, está em 5o lugar em taxa de alfabetização, em 8o lugar em expectativa de vida, em 18o em mortalidade infantil e 18o novamente em número de habitantes por médico e no 20o em população de idade escolar por professor. O processo de militarização tem esse preço, tanto para os países ricos, quanto para os pobres, e é o povo que tem que pagar esse preço.

Teria, então, o desarmamento uma chance realmente verdadeira? É realmente possível um processo de desarmamento que aliviasse esta geração da humanidade da ameaça que pesa sobre sua sobrevivência coletiva, como também diminuisse a atual má utilização dos recursos mundiais?

Não me aprofundarei nas questões que dizem respeito ao contínuo jogo de desarmamento, conforme praticado pelas duas superpotências e seu dois líderes, ajudados por seus aliados ou membros de seus pactos – como demonstrados durante o recente encontro de "cúpula" da OTAN, no começo do mês de março de 1988 – pois isso me levaria a uma outra discussão longa.

Permitam-me dizer somente duas coisas:

– o que quer que aconteça na superfície, glorificado pela opinião dos meios de comunicação de massa, em termos de INF e outros tratados possíveis, encontros de cúpula e similares, o processo de militarização prossegue e a capacidade de extermínio está presente. Os Laboratórios e os planejadores de estratégias não estão se desarmando.

Conseqüentemente, o que é premente é uma pressão política contínua e crescente por parte dos cidadãos preocupados com o problema em todo o mundo sobre líderes políticos de visão curta e sem imaginação no sentido de desenvolver as qualidades necessárias de previsão, combinadas com o reconhecimento das realidades desse nosso mundo interdependente.

Isso poderia levar a uma mudança – perfeitamente possível – na utilização dos recursos mundiais, de propósitos improdutivos e destrutivos para fins produtivos e construtivos, em prol do desenvolvimento.

Mas para isso acontecer o que é exigido é uma mudança radical dos conceitos tradicionais sobre prioridades, políticas e estratégicas de desenvolvimento.

Isso foi discutido durante a Conferência Nórdica sobre Meio-Ambiente e Desenvolvimento, em maio de 1987, inspirada no Relatório Brundtland: "Nosso Futuro Comum". Um subcomitê sobre a Interrelação entre População, Meio-Ambiente, Recursos e Desenvolvimento elaborou um relatório, do qual permitam-me citar o seguinte:

– a primeira dessas mudanças implica em uma profunda modificação na definição de progresso e da utilização de recursos. O potencial destrutivo da má utilização das tecnologias, que não levam em consideração o custo ambiental a longo prazo, deve ser entendido e deve inspirar ações específicas para a mudança de prioridades.

– a segunda mudança também envolve uma nova ética de pensamento sobre políticas de desenvolvimento e programas, uma ética que coloca as pessoas – especialmente pessoas pobres – em primeiro lugar.

– a terceira mudança está relacionada com a importância cada vez maior de um sistema econômico injusto, e com o atual desperdício de recursos, através da corrida armamentista, tanto nos países desenvolvidos quanto nos países em desenvolvimento.

Repito; o estoque cada vez maior de armamentos constitui, hoje, duas ameaças para a humanidade:

– a ameaça à nossa sobrevivência coletiva;

– a ameaça à uma vida decente, em segurança, para as pessoas de todo o mundo.

Segundo o relatório de um subcomitê na Conferência Nórdica:

– Enquanto as pessoas em todo o mundo não se sentirem seguras em sua vida cotidiana não haverá segurança para ninguém. A necessidade de segurança tornou-se assim um conceito global.

Esse é o principal motivo pelo qual é necessária e urgente uma redefinição do conceito de segurança, isto é, um novo pensamento de caráter global.

Porque, na verdade, os problemas globais de nossa época representam uma necessidade de reconhecimento do fato de que nenhum país se sustenta por si só e que existe uma comunidade global de problemas.

– Nós nos encontramos em uma crise comum;

– Todos nós temos interesses comuns;

– Estamos todos unidos na necessidade de segurança comum;

– Esperamos todos por um futuro comum.

Mas, hoje, citando novamente o parágrafo final da Declaração sobre Desarmamento e Desenvolvimento:

– Nosso pequeno planeta está em perigo: pelos arsenais de armas que poderiam explodi-lo; pelo ônus de dispêndios militares que poderiam afundá-lo, e pelas necessidades básicas não satisfeitas de 2/3 de sua população, que sobrevivem com menos de 1/3 de seus recursos.

Realisticamente, não vejo saída para esse nosso dilema comum, senão o do empenho genuíno, em comum, de todos os povos.

Suas vidas é que correm perigo em razão da dupla ameaça à sua sobrevivência.

Primeiro que tudo, devemos buscar a nossa sobrevivência coletiva para afastar a espada de Dâmocles do processo de militarização. Sem isso, não haverá desenvolvimento, nem razão para vida digna de ser vivida.

O desafio está diante de todos nós.

B - INTERNATIONAL COURT OF JUSTICE

Judge José Sette-Camara *

Today, 11 September 1992, the Chamber constituted by the International Court of Justice in the case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, Nicaragua Intervening, delivered its Judgment. The Chamber first adopted the course of the boundary line in the disputed land sections between El Salvador and Honduras. It then ruled on the legal status of the islands of the Gulf of Fonseca, as well as on the legal situation of the maritime spaces within and outside the closing line of that Gulf.

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*(Member of the Court since 6 February 1979; Vice-President 1982-1985; continued to sit after 5 February 1988 as President of the Chamber formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*)

Born in Alfenas, State of Minas Gerais, Brazil, on 14 April 1920.

LL.B., Law School of the University of Minas Gerais.

Master in Civil Law, McGill University, Montreal, Canada.

Member of the Brazilian Society of International Law. Member of the Institute of International Law.

Entered the Brazilian diplomatic service in 1945. Permanent Representative in Geneva (1960-1961). Ambassador to Canada (1961). Ambassador to Switzerland (1963-1964). Permanent Representative to the United Nations (1964-1968). Ambassador to Czechoslovakia (1972-1979).

Head of the Brazilian delegation to the nineteenth, twentieth and twenty-first sessions of the General Assembly. Representative in the Security Council (1964 and 1967-1969). Delegate to the Sixth Committee of the General Assembly (1970-1978).

Elected Member of the International Law Commission to complete Gilberto Amado's mandate (1970). Elected Member of the International Law Commission by the General Assembly for the periods 1971-1976 and 1977-1982. General Rapporteur, Vice-Chairman and Chairman of the International Law Commission.

President of the United Nations Conference on the Representation of States in their Relations with International Organizations, Vienna (1975). Head of the Brazilian delegation to the United Nations Conference on Succession of States in Respect of Treaties.

Author of various publications on international law and international problems, including: *The Ratification of International Treaties*, 1949; "A Doutrina Larreta", *Boletim da Sociedade Brasileira de Direito Internacional*, 1946; "Hans Kelsen e os Fundamentos do Direito Internacional", *Boletim da Sociedade Brasileira de Direito Internacional*, 1947; "United Nations and International Law Making: the Vienna Convention on the Representation of States in Their Relations with International Organizations", *UN Law/Fundamental Rights*, edited by Antonio Cassese, 1979, "Pollution of International Rivers" in the *Recueil des cours* of the Academy of International Law, The Hague, 1984; "The International Law Commission: Discourse on Method", *International Law at the Time of its Codification. Essays in Honour of Roberto Ago*, Milan, 1987; "A conclusão de Tratados Internacionais e o Direito Constitucional Brasileiro", *Boletim da Sociedade Brasileira de Direito Internacional*, 1990.

The Chamber was composed as follows: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Vice-President Oda; Judges *ad hoc* Valticos, Torres Bernárdez.

A summary of the Judgement and of the declaration and opinions appended to it is attached. This summary, prepared by the Registry for the use of the Press, in no way involves the responsibility of the Chamber. It cannot be quoted against the text of the Judgment, of which is does not constitute an interpretation. It is illustrated by six sketch-maps showing, in respect of the disputed sectors of the land boundary, the claims of the Parties and the boundary as found by the Chamber, together with a map showing the whole frontier with a key to the position of the sketch-maps, and a map of the Gulf of Fonseca. These sketch-maps have been prepared purely for illustrative purposes, and have no official status. The operative part of the Chamber's Judgment, set out below, defines the land boundary sectors by reference to turning points identified by letters; those are not reproduced on the attached sketch-maps. Copies of the 1:50,000 scale maps attached to the Judgment, indicating the line and the lettered points, are available for inspection in the Registry.

The full text of the operative part of the Judgment is as follows:

"425. For the reasons set out in the present Judgment, in particular paragraphs 68 to 103 thereof,

THE CHAMBER,

Unanimously,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the first sector of their common frontier not described in Article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980, is as follows:

From the international tripoint known as El Trifinio on the summit of the Cerro Montecristo (point A on Map No. I annexed; co-ordinates: 14º25'10" N, 89º21'20" W), the boundary runs in a generally easterly direction along the watershed between the rivers Frio or Sesecapa and Del Rosario as far as the junction of this watershed with the watershed of the basin of the *quebrada* de Pomola (point B on Map No. I annexed; co-ordinates: 14º25'05" N, 89º20'41" W); thereafter in a north-easterly direction along the watershed of the basin of the *quebrada* de Pomola until the junction of this watershed with the watershed between the *quebrada* de Cipresales and the *quebrada* del Cedrón, Peña Dorada and Pomola proper (point C on Map No. I annexed; co-ordinates: 14º25'09" N, 89º20'30" W); from that point, along the last-named watershed as far as the intersection of the centre-lines of the *quebradas* of Cipresales and Pomola (point D on Map No. I annexed; co-ordinates: 14º24'42" N, 89º18'19" W); thereafter, downstream along the centre-line of the *quebrada* de Pomola, until the point on that centre-line which is closest to the boundary marker of Pomola at El Talquezalar; and from that point in a straight line as far as that marker (point E on Map No. I annexed; co-ordinates: 14º24'51" N, 89º17'54" W); from there in a straight line in a south-easterly direction to the boundary

marker of the Cerro Piedra Menuda (point F on Map No. I annexed; co-ordinates: 14°24'02" N, 89°16'40" W), and thence in a straight line to the boundary marker of the Cerro Zapotal (point G on Map No. I annexed; co-ordinates: 14°23'26" N, 89°14'43" W); for the purposes of illustration, the line is indicated on Map No. I annexed.

426. For the reasons set out in the present Judgment, in particular paragraphs 104 to 127 thereof,

THE CHAMBER,

Unanimously,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the second sector of their common frontier not described in Article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980, is as follows:

From the Peña de Cayaguanca (Point A on Map No. II annexed; co-ordinates: 14°21'54" N, 89°10'11" W), the boundary runs in a straight line somewhat south of east to the Loma de Los Encinos (point B on Map No. II annexed; co-ordinates: 14°21'08" N, 89°08'54" W), and from there in a straight line to the hill known as El Burro or Piedra Rajada (point C on Map No. II annexed; co-ordinates: 14°22'46" N, 89°07'32" W); from there the boundary runs in a straight line to the head of the *quebrada* Copantillo, and follows the middle of the *quebrada* Copantillo downstream to its confluence with the river Sumpul (point D on Map No. II annexed; co-ordinates: 14°24'12" N, 89°06'07" W), and then follows the middle of the river Sumpul downstream to its confluence with the *quebrada* Chiquita or Oscura (point E on Map No. II annexed; co-ordinates: 14°20'25" N, 89°04'57" W); for the purposes of illustration, the line is indicated on Map No. II annexed.

427. For the reasons set out in the present Judgment, in particular paragraphs 128 to 185 thereof,

THE CHAMBER,

Unanimously,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the third sector of their common frontier not described in Article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980, is as follows:

From the Pacacio boundary marker (point A on Map No. III annexed; co-ordinates: 14°06'28" N, 88°49'18" W) along the rio Pacacio upstream to a point (point B on Map No. III annexed; co-ordinates: 14°06'38" N, 88°48'47" W), west of the Cerro Tecolate or Los Tecolates; from there up the *quebrada* to the crest of the Cerro Tecolate or Los Tecolates (point C on Map No. III annexed; co-ordinates: 14°06'33" N, 88°48'18" W), and along the watershed of this hill as far as a ridge approximately 1 kilometer to the north-east (point D on Map No. III annexed; co-ordinates: 14°06'48" N, 88°47'52" W); from there in an easterly direction to the neighbouring hill above the source of the Torrente La Puerta

(point E on Map No. III annexed; co-ordinates: 14°06'48" N, 88°47'31' W) and down that stream to where it meets the river Gualsinga (point F on Map No. III annexed; co-ordinates: 14°06'19" N, 88°47'01" W); from there the boundary runs along the middle of the river Gualsinga downstream to its confluence with the river Sazalapa (point G on Map No. III annexed; co-ordinates: 14°06'12" N, 88°46'58" W), and thence upstream along the middle of the river Sazalapa to the confluence of the *quebrada* Llano Negro with that river (point H on Map No. III annexed; co-ordinates: 14°07'11" N, 88°44'21" W); from there south-eastwards to the top of the hill (point I on Map No. III annexed; co-ordinates: 14°07'01" N, 88°44'07" W), and thence south-eastwards to the crest of the hill marked on the map as a spot height of 1,017 meters (point J on Map No. III annexed; co-ordinates: 14°06'45" N, 88°43'45" W); from there the boundary, inclining still more to the south, runs through the triangulation point known as La Cañada (point K on Map No. III annexed; co-ordinates: 14°06'00" N, 88°43'52" W) to the ridge joining the hills indicated on the map as Cerro El Caracol and Cerro El Sapo (through point L on Map No. III annexed; co-ordinates: 14°05'23" N, 88°43'47" W) and from there to the feature marked on the map as the Portillo El Chupa Miel (point M on Map No. III annexed; co-ordinates: 14°04'35" N, 88°44'10" W); from there, following the ridge, to the Cerro El Cajete (point N on Map No. III annexed; co-ordinates: 14°03'55" N, 88°44'20" W), and thence to the point where the present-day road from Arcatao to Nombre Jesús passes between the Cerro El Ocotillo and the Cerro Lagunetas (point O on Map No. III annexed; co-ordinates: 14°03'18" N, 88°44'16" W); from there south-eastwards to the crest of a hill marked on the map as a spot height of 848 meters (point P on Map No. III annexed; co-ordinates: 14°02'58" N, 88°43'56" W); from there slightly south of eastwards to a *quebrada* and down the bed of the *quebrada* to its junction with the Gualcuquin river (point Q on Map No. III annexed; co-ordinates: 14°02'42" N, 88°42'34" W); the boundary then follows the middle of the Gualcuquin river downstream to the Poza del Cajon (point R on Map No. III annexed; co-ordinates: 14°01'28" N, 88°41'10" W); for purposes of illustration, this line is shown on Map No. III annexed.

428. For the reasons set out in the present Judgment, in particular paragraphs 186 to 267 thereof,

THE CHAMBER,

By four votes to one,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the fourth sector of their common frontier not described in Article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980, is as follows:

From the source of the Orilla stream (Point A on Map No. IV annexed; co-ordinates: 13°53'46" N, 88°20'36" W) the boundary runs through the pass of El Jobo to the source of the Cueva Hedionda stream (point B on Map No. IV; co-ordinates: 13°53'39" N, 88°20'20" W), and thence down the middle of that stream to its confluence with the river Las Cañas (Point C on Map No. IV annexed; co-ordinates: 13°53'19" N, 88°19'00" W), and thence following the middle of the river upstream as far as a point (point D on Map No. IV annexed; co-ordinates: 13°56'14" N, 88°15'33" W) near the settlement of Las Piletas;

from there eastwards over a col indicated as point E on Map No. IV annexed (co-ordinates: 13°56'19" N, 88°14'12" W), to a hill indicated as point F on Map No. IV annexed (co-ordinates: 13°56'11" N, 88°13'40" W), and then north-eastwards to a point on the river Negro or Pichigual (marked G on Map No. IV annexed; co-ordinates: 13°57'12" N, 88°13'11" W); downstream along the middle of the river Negro or Pichigual to its confluence with the river Negro-Quiagara (point H on Map No. IV; co-ordinates: 13°59'37" N, 88°14'18" W); then upstream along the middle of the river Negro-Quiagara as far as the Las Pilas boundary marker (point I on Map No. IV; co-ordinates: 14°00'02" N, 88°06'29" W), and from there in a straight line to the Malpaso de Similatón (point J on Map No. IV; co-ordinates: 13°59'28" N, 88°04'22" W); for the purposes of illustration, the line is indicated on Map No. IV annexed.

IN FAVOUR: *Judge* Sette-Camara, *President of the Chamber*; *President* Sir Robert Jennings; *Vice-President* Oda; *Judge* and hoc Torres Bernárdez;

AGAINST: *Judge* ad hoc Valticos.

429. For the reasons set out in the present Judgment, in particular paragraphs 268 to 305 thereof,

THE CHAMBER,

Unanimously,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the fifth sector of their common frontier not described in Article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980, is as follows:

From the confluence with the river Torola of the stream identified inn the General Treaty of Peace as the *quebrada* de Mansupucagua (point A on Map No. V annexed; co-ordinates: 13°53'59" N, 87°54'30" W) the boundary runs upstream along the middle of the river Torola as far as its confluence with a stream along the middle of the river Torola as far as its confluence with a stream know as the *quebrada* del Arenal or *quebrada* de Aceituno (point B on Map No. V annexed; co-ordinates: 13°53'50" N, 87°50'40" W); thence up the course of that stream as far as a point at or near its source (point C on Map No. V annexed; co-ordinates: 13°54'30" N, 87°50'20" W), and thence in a straight line somewhat north of east to a hill some 1,100 meters high (point D on Map No. V annexed; co-ordinates: 13°55'03" N, 87°49'50" W); thence in a straight line to a hill near the river Unire (point E on Map No. V annexed; co-ordinates: 13°55'16" N, 87°48'20" W), and thence to the nearest point on the river Unire; downstream along the middle of that river to the point known as the Paso de Unire (point F on Map No. V annexed; co-ordinates: 13°52'07" N, 87°46'01" W); for the purposes of illustration, the line is indicated on Map No. V annexed.

430. For the reasons set out in the present Judgment, in particular paragraphs 306 to 322 thereof,

THE CHAMBER,

Unanimously,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the sixth sector of their common frontier not described in Article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980, is as follows:

From the point on the river Goascorán known as Los Amates (point A on Map No. VI annexed; co-ordinates: 13º26'28" N, 87º43'25" W), the boundary follows the course of the river downstream, in the middle of the bed, to the point where it emerges in the waters of the Bahia La Unión, Gulf of Fonseca, passing to the north-west of the Islas Ramaditas, the co-ordinates of the endpoint in the bay being 13º24'26" N, 87º49'59" W; for the purposes of illustration, the line is indicated on Map No. VI annexed.

431. For the reasons set out in the present Judgment, in particular paragraphs 323 to 368 thereof,

THE CHAMBER,

1. By four votes to one,

Decides that the Parties, by requesting the Chamber, in Article 2, paragraph 2, of the Special Agreement of 24 May 1986, "to determine the legal situation of the islands ...", have conferred upon the Champer jurisdiction to determine, as between the Parties, the legal situation of all the islands of the Gulf of Fonseca/ but that such jurisdiction should only be exercised in respect of those islands which have been shown to be the subject of a dispute;

IN FAVOUR: *Judge* Sette-Camara, *President of the Chamber*, *President* Sir Robert Jennings; *Vice-President* Oda; *Judge* ad hoc Valticos;

AGAINST: *Judge* ad hoc Torres Bernárdez.

2. *Decides* that the islands shown to be in dispute between the Parties are:

(i) by four votes to one, El Tigre;

IN FAVOUR: *Judge* Sette-Camara, *President of the Chamber*, *President* Sir Robert Jennings; *Vice-President* Oda; *Judge* ad hoc Valticos;

AGAINST: *Judge* ad hoc Torres Bernárdez;

(ii) unanimously, Meanguera and Meanguerita.

3. Unanimously,

Decides that the island of El Tigre is part of the sovereign territory of the Republic of Honduras.

4. Unanimously,

Decides that the island of Meanguera is part of the sovereign territory of the Republic of El Salvador.

5. By four votes to one,

Decides that the island of Meanguerita is part of the sovereign territory of the Republic of El Salvador;

IN FAVOUR: *Judge* Sette-Camara, *President of the Chamber*; *President* Sir Robert Jennings; *Vice-President* Oda; *Judge* ad hoc Valticos;

AGAINST: *Judge* ad hoc Torres Bernárdez.

432. For the reasons set out in the present Judgment, in particular paragraphs 369 to 420 thereof,

THE CHAMBER,

1. By four votes to one,

Decides that the legal situation of the waters of the Gulf of Fonseca is as follows: the Gulf of Fonseca is an historic bay the waters whereof, having previously to 1821 been under the single control of Spain, and from 1821 to 1839 of the Federal Republic of Central America, were thereafter succeeded to and held in sovereignty by the Republic of El Salvador, the Republic of Honduras, and the Republic of Nicaragua, jointly, and continue to be so held, as defined in the present Judgment, but excluding a belt, as at present established, extending 3 miles (1 marine league) from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State, and subject to the delimitation between Honduras and Nicaragua effected in June 1900, and to the existing rights of innocent passage through the 3-mile belt and the waters held in sovereignty jointly; the waters at the central portion of the closing line of the Gulf, that is to say, between a point on that line 3 miles (1 marine league) from Punta Amapala and a point on that line 3 miles (1 marine league) from Punta Cosigüina, are subject to the joint entitlement of all three States of the Gulf unless and until a delimitation of the relevant maritime area be effected;

IN FAVOUR: *Judge* Sette-Camara, *President of the Chamber*; *President* Sir Robert Jennings; *Judge* ad hoc Valticos; *Judge* ad hoc Torres Bernárdez;

AGAINST: *Vice-President* Oda.

2. By four votes to one,

Decides that the Parties, by requesting the Chamber, in Article 2, paragraph 2, of the Special Agreement of 24 May 1986, "to determine the legal situation of the ... maritime

spaces", have not conferred upon the Chamber jurisdiction to effect any delimitation of those maritime spaces, whether within or outside the Gulf;

IN FAVOUR: *Judge* Sette-Camara, *President of the Chamber*; *President* Sir Robert Jennings; *Vice-President* Oda; *Judge* ad hoc Valticos;

AGAINST: *Judge* ad hoc Torres Bernárdez.

3. By four votes to one,

Decides that the legal situation of the waters outside the Gulf is that, the Gulf of Fonseca being an historic bay with three coastal States, the closing line of the Gulf constitutes the baseline of the territorial sea; the territorial sea, continental shelf and exclusive economic zone of El Salvador and those of Nicaragua off the coasts of those two States are also to be measured outwards from a section of the closing line extending 3 miles (1 marine league) along that line from Punta Amapala (in El Salvador) and 3 miles (1 marine league) from Punta Cosigüina (in Nicaragua) respectively; but entitlement to territorial sea, continental shelf and exclusive economic zone seaward of the central portion of the closing line appertains to the three States of the Gulf, El Salvador, Honduras and Nicaragua; and that any delimitation of the relevant maritime areas is to be effected by agreement on the basis of international law.

IN FAVOUR: *Judge* Sette-Camara, *President of the Chamber*; *President* Sir Robert Jennings; *Judge* ad hoc Valticos; *Judge* ad hoc Torres Bernárdez;

AGAINST: *Vice-President* Oda."

Vice-President Oda appended a declaration to the Judgment; Judges *ad hoc* Valticos and Torres Bernárdez appended separate opinions; Vice-President Oda appended a dissenting opinion.

The printed text of the Judgment and of the opinions appended to it will become available in due course (orders and enquiries should be addressed to the Distribution and Sales Section, Office of the United Nations, 1211 Geneva 10; the Sales Section, United Nations, New York, N.Y. 10017; or any appropriately specialized bookshop).

SUMMARY OF THE JUDGMENT

I. Qualités (paras. 1-26)

The Chamber recapitulates the successive phases of the proceedings, namely: notification to the Registrar, on 11 December 1986, of the Special Agreement signed on 24 May 1986 (in force on 1 October 1986) for the submission to a Chamber of the Court of a dispute between the two States; formation by the Court, on 8 May 1987, of the Chamber to deal with the case; filing by Nicaragua, on 17 November 1989, of an Application for permission to intervene in the case; Order by the Court, of 28 February 1990, on the question whether Nicaragua's Application for permission to intervene was a matter within the competence of the full Court or of the Chamber; Judgment of the

Chamber of 13 September 1990 acceding to Nicaragua's application for permission to intervene (but solely in respect of the question of the status of the waters of the Gulf of Fonseca); holding of oral proceedings.

Article 2 of the Special Agreement, which defines the subject of the dispute, reads, in an agreed English translation:

"The Parties request the Chamber:

1. To delimit the frontier line in the areas or sections not described in Article 16 of the General Peace Treaty of 30 October 1980.

2. To determine the legal situation of the islands and maritime spaces."

The Judgment then quotes the submissions of the Parties, and the "conclusions" of the intervening State, as formulated at the various stages of the proceedings.

II. General introduction (paras. 27-39)

The dispute before the Chamber has three elements: a dispute over the land boundary; a dispute over the legal situation of islands (in the Gulf of Fonseca); and a dispute over the legal situation of maritime spaces (within and outside the Gulf of Fonseca).

The two Parties (and the intervening State) came into being with the break-up of the Spanish Empire in Central America; their territories correspond to administrative sub-divisions of that Empire. It was from the outset accepted that the new international boundaries should, in accordance with the principle generally applied in Spanish America of the *uti possidetis juris*, follow the colonial administrative boundaries.

After the independence of Central America from Spain was proclaimed on 15 September 1821, Honduras and El Salvador first made up, together with Costa Rica, Guatemala and Nicaragua, the Federal Republic of Central America, corresponding to the former Captaincy-General of Guatemala or Kingdom of Guatemala. On the disintegration of that Republic in 1839, El Salvador and Honduras, along with the other component States, became separate States.

The Chamber outlines the development of the three elements of the dispute, beginning with the genesis of the island dispute in 1854 and of the land dispute in 1861. Border incidents led to tension and subsequently to armed conflict in 1969, but in 1972 El Salvador and Honduras were able to agree on the major part of their land boundary, which had not yet been delimited, leaving however six sectors to be settled. A mediation process begun in 1978 led to a General Treaty of Peace, signed and ratified in 1980 by the two Parties, which defined the agreed sections of the boundary.

The Treaty further provided that a Joint Frontier Commission should delimit the frontier in the remaining six sectors and "determine the legal situation of the islands and the maritime spaces". It provided that if within five years total agreement was not reached,

the Parties would, within six months, negotiate and conclude a special agreement to submit any existing controversy to the International Court of Justice.

As the Commission did not accomplish its task within the time fixed, the Parties negotiated and concluded on 24 May 1986 the Special Agreement mentioned above.

III. The land boundary; Introduction (paras. 40-67)

The Parties agree that the fundamental principle for determining the land frontier is the *uti possidetis juris*. The Chamber notes that the essence of the agreed principle is its primary aim of securing respect for the territorial boundaries at the time of independence, and its application has resulted in colonial administrative boundaries being transformed into international frontiers.

In Spanish Central America there were administrative boundaries of different kinds of degrees, and the jurisdictions of general administrative bodies did not necessarily coincide territorially with those of bodies possessing particular or special jurisdiction. In addition to the various civil jurisdictions there were ecclesiastical ones, which the main administrative units had to follow in principle.

The Parties have indicated to which colonial administrative divisions (provinces) they claim to have succeeded. The problem is to identify the areas, and the boundaries, which corresponded to these provinces, which in 1821 became respectively El Salvador and Honduras. No legislative or similar material indicating this has been produced, but the Parties have submitted, *inter alia*, documents referred to collectively as "titles" *(títulos)*, concerning grants of land by the Spanish Crown in the disputed areas, from which, it is claimed, the provincial boundaries can be deduced.

The Chamber then analyses the various meanings of the term "title". It concludes that, reserving, for the present, the special status El Salvador attributes to "formal title deeds to commons", none of the titles produced recording grants of land to individuals or Indian communities can be considered as "titles" in the same sense as, for example, a Spanish Royal Decree attributing certain areas to a particular administrative unit; they are rather comparable to "colonial *effectivités*" as defined in a previous case, i.e., "the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period"" *(I.C.J. Reports 1986*, p. 586, para. 63). In some cases the grant of a title was not perfected, but the record, particularly of a survey, remains a "colonial *effectivité*" which may serve as evidence of the position of a provincial boundary.

Referring to the seven sectors of the boundary agreed in the General Treaty of Peace, the Chamber assumes that the agreed boundary was arrived at applying principles and processes similar to those urged upon the Chamber for the non-agreed sectors. Observing the predominance of local features, particularly rivers, in the definition of the agreed sectors, the Chamber has taken some account of the suitability of certain topographical features to provide an identifiable and convenient boundary. The Chamber is here appealing not so much to any concept of "natural frontiers", but rather to a presumption underlying the boundaries on which the *uti possidetis juris* operates.

Under Article 5 of the Special Agreement, the Chamber is to take into account the rules of international law applicable between the Parties, "including, where pertinent, the provisions of" the Treaty. This presumably means that the Chamber should also apply, where pertinent, even those Articles which in the Treaty are addressed specifically to the Joint Frontier Commission. One of these is Article 26 of the Treaty, to the effect that the Commission shall take as a basis for delimitation the documents issued by the Spanish Crown or any other Spanish authority, secular or ecclesiastical, during the colonial period, and indicating the jurisdictions or limits of territories or settlements, as well as other evidence and arguments of a legal, historical, human or any other kind, brought before it by the Parties and admitted under international law.

Drawing attention to the difference between its task and that of the Commission, which had merely to propose a frontier line, the Chamber observes that Article 26 is not an applicable law clause, but rather a provision about evidence. In this light, the Chamber comments on one particular class of titles, referred to as the "formal title-deeds to commons", for which El Salvador has claimed a particular status in Spanish colonial law, that of acts of the Spanish Crown directly determining the extent of the territorial jurisdiction of an administrative division. These titles, the so-called *títulos ejidales*, are, according to El Salvador, the best possible evidence in relation to the application of the *uti possidetis juris* principle.

The Chamber does not accept any interpretation of Article 26 as signifying that the Parties have by treaty adopted a special rule or method of determination of the *uti possidetis* juris boundaries, on the basis of divisions between Indian *poblaciones*. It was the administrative boundaries between Spanish colonial administrative units, not the boundaries between Indian settlements as such, that were transformed into international boundaries in 1821.

El Salvador contends that the commons whose formal title-deeds it relies on were not private properties but belonged to the municipal councils of the corresponding poblaciones. Control over those communal lands being exercised by the municipal authorities, and over and above them by those of the colonial province to which the commons had been declared to belong, El Salvador maintains that if such a grant of commons to a community in one province extended to lands situated within another, the administrative control of the province to which the community belonged was determinative for the application of the uti possidetis juris, i.e., that, on independence, the whole area of the commons appertained to the State within which the community was situated. The Chamber, which is faced with a situation of this kind in three of six disputed sectors, has however been able to resolve the issue without having to determine this particular question of Spanish colonial law, and therefore sees no reason to attempt to do so.

In the absence of legislative instruments formally defining provincial boundaries, not only land grants to Indian communities but also grants to private individuals afford some evidence as to the location of boundaries. There must be a presumption that such grants would normally avoid straddling a boundary between different administrative authorities, and where the provincial boundary location was doubtful the common boundaries of two grants by different provincial authorities could well have become the provincial boundary.

The Chamber therefore considers the evidence of each of these grants on its merits and in relation to other arguments, but without treating them as necessarily conclusive.

With regard to the land that had not been the subject of grants of various kinds by the Spanish Crown, referred to as crown lands, *tierras realengas*, the Parties agree that such land was not unattributed but appertained to the one province or the other and accordingly passed, on independence, into the sovereignty of the one State or the other.

With regard to post-independence grants or titles, the so-called "republican titles", the Chamber considers that they may well provide some evidence of the position in 1821 and both Parties have offered them as such.

El Salvador, while admitting that the *uti possidetis juris* is the primary element for determining the land boundary, also puts forward, in reliance on the second part of Article 26, arguments referred to as either "arguments of a human nature" or arguments based on *effectivités*. Honduras also recognizes a certain confirmatory role for *effectivités* and has submitted evidence of acts of administration of its own for that purpose.

El Salvador has first advanced arguments and material relating to demographic pressures in El Salvador creating a need for territory, as compared with the relatively sparsely populated Honduras, and to the superior natural resources said to be enjoyed by Honduras. El Salvador, however, does not appear to claim that a frontier based on the principle of *uti possidetis juris* could be adjusted subsequently (except by agreement) on the ground of unequal population density. The Chamber will not lose sight of this dimension of the matter, which is however without direct legal incident.

El Salvador also relies on the alleged occupation of disputed areas by Salvadorians, their ownership of land in those areas, the supply by it os public services there and its exercise in the areas of government powers, and claims, *inter alia*, that the practice of effective administrative control has demonstrated an "*animus*" to posses the territories. Honduras rejects any argument of "effective control", suggesting that the concept only refers to administrative control prior to independence. It considers that, at least since 1884, no acts of sovereignty in the disputed areas can be relied on in view of the duty to respect the status quo in a disputed area. It has however presented considerable material to show that Honduras can also rely on arguments of a human kind.

The Chamber considers that it may have regard, in certain instances, to documentary evidence of post-independence *effectivités* affording indications of the 1821 *uti possidetis juris* boundary, provided a relationship exists between the *effectivités* and the determination of that boundary.

El Salvador drew attention to difficulties in collecting evidence in certain areas owing to interference with governmental activities due to acts of violence. The Chamber, while appreciating these difficulties, cannot apply a presumption that evidence which is unavailable would, if produced, have supported a particular Party's case, still less a presumption of the existence of evidence not produced. In view of these difficulties, El Salvador requested the Chamber to consider exercising its functions under Article 66 of

the Rules of Court to obtain evidence *in situ*. The Parties were however informed that the Chamber did not consider it necessary to exercise the functions in question, nor to exercise its power, under Article 50 of the Statute, to arrange for an inquiry or expert opinion in the case, as El Salvador had also requested it to do.

The Chamber will examine, in respect of each disputed sector, the evidence of post-colonial *effectivités*. Even when claims of *effectivité* are given their due weight, it may occur in some areas that, following the delimitation of the disputed sector, nationals of one Party will find themselves in the territory of the other. The Chamber has every confidence that the necessary measures to take account of this will be taken by the Parties.

In connection with the concept of the "critical date" the Chamber observes that there seems to be no reason why acquiescence or recognition should not operate where there is sufficient evidence to show that the Parties have in effect clearly accepted a variation or an interpretation of the *uti possidetis juris* position.

IV. First sector of the land boundary (paras. 68-103)

The first disputed sector of the land boundary runs from the agreed tripoint where the frontiers of El Salvador, Guatemala and Honduras converge (Cerro Montecristo) to the summit of the Cerro Zapotal (see sketch-map A).

Both Parties recognize that most of the area between the lines they put forward corresponds to the land that was the subject of a *título ejidal* over the mountain of Tepangüisir, granted in 1776 to the Indian community of San Francisco de Citalá, which was situated in, and under the jurisdiction of, the province of San Salvador. El Salvador contends that on independence the lands so granted became part of El Salvador, so that in 1821 the boundary of the two provinces was defined by the north-eastern boundary of the Citalá *ejido*. Honduras, on the other hand, points out that when the 1776 title was granted, those lands included in it were specifically stated to be in the Honduran province of Gracias a Dios, so that the lands became on independence part of Honduras.

The Chamber considers that it is not required to resolve this question. All negotiations prior to 1972 over the dispute as to the location of the frontier in this sector were conducted on the basis, accepted by both sides, that it was the boundary between the *ejidos* of Citalá and Ocotepeque that defined the frontier. The frontier corresponding to Honduras's current interpretation of the legal effect of the 1776 Citalá title was first put forward in negotiations held in 1972. Moreover a title granted by Honduras in 1914, and the position taken by Honduras in the course of tripartite negotiations held between El Salvador, Guatemala and Honduras in 1934-1935, confirmed the agreement between the Parties that the boundary between Citalá and Ocotepeque defined the frontier between them. After recalling that the effect of the *uti possidetis juris* principle was not to freeze for all time the provincial boundaries, the Chamber finds that Honduras's conduct from 1881 to 1972 may be regarded as acquiescence in a boundary corresponding to that between the Tepangüisir lands of Citalá and those of Ocotepeque.

The Chamber then turns to the question of a triangular area where, according to Honduras, the 1818 title of Ocotepeque penetrated the north-eastern boundary of Citalá, and to the disagreement between the Parties as to the interpretation of the Citalá survey as regards the north-western area.

With regard to the triangular area, the Chamber does not consider that such an overlapping would have been consciously made, and that it should only be concluded that an overlap came about by mistake if there is no doubt that the two titles are not compatible. The identification of the various relevant geographical locations cannot however be achieved with sufficient certainty to demonstrate an overlap.

With respect to the disagreement on the boundary of the Citalá title, the Chamber concludes that on this point the Honduran interpretation of the relevant survey record is to be preferred.

The Chamber then turns to the part of the disputed area lying between the lands comprised in the Citalá title and the international tripoint. Honduras contends that since, according to the survey, the land in this area was crown land (*tierras realengas*), and the survey was being effected in the province of Gracias a Dios, these must have been *tierras realengas* of that province and hence are now part of Honduras.

El Salvador however claims this area on the basis of *effectivités, and points to a number of villages or hamlets belonging to the municipality of Citalá within the area. The Chamber notes however the absence of evidence that the area or its inhabitants were under the administration of that municipality. El Salvador also relies on a report by a Honduran Ambassador stating that the lands of the disputed area belonged to inhabitants of the municipality of Citalá in El Salvador. The Chamber however does not regard this as sufficient since to constitute an effectivité* relevant to the delimitation of the frontier at least some recognition or evidence was required of the effective administration of the municipality of Citalá in the area, which, it notes, has not been proved.

El Salvador also contends that ownership of land by Salvadorians in the disputed area less than 40 kilometers from the line Honduras claims as the frontier shows that the area was not part of Honduras, as under the Constitution of Honduras land within 40 kilometers of the frontier may only be acquired or possessed by native Hondurans. The Chamber rejects this contention since at the very least some recognition by Honduras of the ownership of land by Salvadorians would have to be shown, which is not the case.

The Chamber observes that in the course of the 1934-1935 negotiations agreement was reached on a particular frontier line in this area. The agreement by the representatives of El Salvador was only *ad referendum*, but the Chamber notes that while the Government of El Salvador did not ratify the terms agreed upon *ad referendum*, neither did it denounce them; nor did Honduras retract its consent.

The Chamber considers that it can adopt the 1935 line, primarily since for the most part it follows the watersheds, which provide a clear and unambiguous boundary; it reiterates its view that the suitability of topographical features to provide a readily identifiable and

convenient boundary is the material aspect where no conclusion unambiguously pointing to another boundary emerges from the documentary material.

As regards material put forward by Honduras concerning the settlement of Hondurans in the disputed areas and the exercise there of government functions by Honduras, the Chamber finds this material insufficient to affect the decision by way of *effectivités*.

The Chamber's conclusion regarding the first disputed sector of the land frontier is as follows:

> "It begins at the tripoint with Guatemala, the 'point known as El Trifinio on the summit of the Cerro Montecristo' ... From this point, the frontier between El Salvador and Honduras runs in a generally easterly direction, following the direct line of watersheds, in in accordance with the agreement reached in 1935, and accepted *ad referendum* by the representatives of El Salvador, ... In accordance with the 1935 agreement ... , the frontier runs 'along the watershed between the rivers Frio or Sesecapa and Del Rosario as far as the junction of this watershed with the watershed of the basin of the *quebrada* de Pomola' ... ; 'thereafter in a north-easterly direction along the watershed of the basin of the *quebrada* de Pomola until the junction of this watershed with the watershed between the *quebrada* de Cipresales and the *quebrada* del Cedrón, Peña Dorada and Pomola proper' ... ; 'from that point, along the last-named watershed as far as the intersection of the centre-lines of the *quebradas* of Cipresales and Pomola' ... ; 'thereafter, downstream along the centre-line of the *quebrada* de Pomola, until the point on that centre-line which is closest to the boundary marker of Pomola at El Talquezalar; and from that point in a straight line as far as that marker' ... From the boundary marker of El Talquezalar, the frontier continues in a straight line in a south-easterly direction to the boundary marker of the Cerro Piedra Menuda ... , and thence in a straight line to the boundary marker of the Cerro Zapotal ..."

V. Second sector of the land boundary (paras. 104-127)

The second disputed sector of the land boundary lies between the Peña de Cayaguanca, and the confluence of the stream of Chiquita or Oscura with the river Sumpul (see sketch-map B). Honduras bases its claim chiefly on the 1742 title of Jupula, issued in the context of the long-standing dispute between the Indians of Ocotepeque in the province of Gracias a Dios, and those of Citalá, in the province of San Salvador. The principal outcome was the confirmation and agreement of the boundaries of the lands of Jupula, over which the Indians of Ocotepeque claimed to have rights and which were attributed to the Indians of Citalá. It was however recorded that the inhabitants of Ocotepeque, having recognized the entitlement of the inhabitants of Citalá to the land surveyed, also requested "that there be left free for them a mountain called Cayaguanca which is above the Jupula river, which is crown land," and this request was acceded to.

The Chamber finds that the Jupula title was evidence that in 1742 the mountain of Cayaguanca was *tierras realengas* and since the community of Ocotepeque, in the Province of Gracias a Dios, was to cultivate it, it concludes that the mountain was *tierras realengas* of that province, for which reason the mountain must on independence have formed part of Honduras on the basis of the *uti possidetis juris*.

The Chamber then turns to the location and extent of the mountain, which, according to Honduras, extended over the whole of the disputed area in this sector, a claim disputed by El Salvador. In addition to arguments based on the wording of the 1742 title, El Salvador refers to the 1818 title of Ocotepeque, issued to the community of Ocotepeque to re-establish the boundary markers of its lands, contending that the mountain of Cayaguanca would necessarily have been included in that title if it had truly been awarded to the inhabitants of Ocotepeque in 1742. The Chamber does not accept this argument; it finds that in 1821 the Indians of Ocotepeque, in the province of Gracias a Dios, were entitled to the land resurveyed in 1818, and also to rights of usage over the mountain of Cayaguanca somewhere to the east, and that the area subject to these rights, being *tierras realengas* of the province of Gracias a Dios, became Honduran upon independence.

The problem remains, however, of determining the extent of the mountain of Cayaguanca. The Chamber sees no evidence of its boundaries, and in particular none to support the Honduran claim that the area so referred to in 1742 extended as far east as the river Sumpul, as claimed by Honduras.

The Chamber next considers what light might be thrown on the matter by the republican title invoked by El Salvador, referred to as that of Dulce Nombre de la Palma, granted in 1833 to the community of La Palma in El Salvador. The Chamber considers this title significant in that it showed how the *uti possidetis juris* position was understood when it was granted, i.e., very shortly after independence. The Chamber examines in detail the Parties' conflicting interpretation of the title; it does not accept El Salvador's interpretation whereby it would extend as far west as the Peña de Cayaguanca, and as co-terminous with the land surveyed in 1742 for the Jupula title, and concludes that there was an intervening area not covered by either title. On this basis the Chamber determines the course of the northwestern boundary of the title of Dulce Nombre de la Palma; the eastern boundary, as recognized by both Parties, is the river Sumpul.

The Chamber then examines three Honduran republican titles in the disputed area, concluding that they do not conflict with the Dulce Nombre de la Palma title so as to throw doubt on its interpretation.

The Chamber goes on to examine the *effectivités* claimed by each Party to ascertain whether they support the conclusion based on the latter title. The Chamber concludes that there is no reason to alter its findings as to the position of the boundary in this region.

The Chamber next turns to the claim by El Salvador to a triangular strip along and outside the north-west boundary of the Dulce Nombre de la Palma title, which El Salvador claims to be totally occupied by Salvadorians and administered by Salvadorian authorities. No evidence to that effect has however been laid before the Chamber. Nor does it consider that a passage in the Reply of Honduras regarded by El Salvador as an admission of the existence of Salvadorian *effectivités* in this area can be so read. There being no other evidence to support El Salvador's claim to the strip in question, the Chamber holds that it appertains to Honduras, having formed part of the "mountain of Cayaguanca" attributed to the community of Ocotepeque in 1742.

The Chamber turns finally to the part of the boundary between the Peña de Cayaguanca and the western boundary of the area covered by the Dulce Nombre de la Palma title. It finds that El Salvador has not made good any claim to any area further west than the Loma de los Encinos or "Santa Rosa hillock", the most westerly point of the Dulce Nombre de la Palma title. Noting that Honduras has only asserted a claim, on the basis of the rights of Ocotepeque to the "mountain of Cayaguanca", so far south as a straight line joining the Peña de Cayaguanca to the beginning of the next agreed sector, the Chamber considers that neither the principle *ne ultra petita*, nor any suggested acquiescence by Honduras in the boundary asserted by it, debars the Chamber from enquiring whether the "mountain of Cayaguanca" might have extended further south, so as to be co-terminous with the eastern boundary of the Jupula title. In view of the reference in the latter to Cayaguanca as lying east of the most easterly landmark of Jupula, the Chamber considers that the area between the Jupula and the la Palma lands belongs to Honduras, and that in the absence of any other criteria for determining the southward extent of that area, the boundary between the Peña de Cayaguanca and the Loma de los Encinos should be a straight line.

The Chamber's conclusion regarding the course of the frontier in the second disputed sector is as follows:

> "From ... the Peña de Cayaguanca, the frontier runs in a straight line somewhat south of east to the Loma de Los Encinos ... , and from there in a straight line on a bearing of N 48° E, to the hill shown on the map produced by El Salvador as El Burro (and on the Honduran maps and the United States Defense Mapping Agency maps as Piedra Rajada) ... The frontier then takes the shortest course to the head of the *quebrada* del Copantillo, and follows the *quebrada* del Copantillo downstream to its confluence with the river Sumpul ... , and follows the river Sumpul in turn downstream until its confluence with the *quebrada* Chiquita or Oscura ... "

VI. Third sector of the land boundary (paras. 128-185)

The third sector of the land boundary in dispute lies between the boundary marker of the Pacacio, on the river of that name, and the boundary marker Poza del Cajón, on the river known as El Amatillo or Guaicuquín (see sketch-map C).

In terms of the grounds asserted for the claims of the Parties the Chamber divides the disputed area into three parts.

In the first part, the north-western area, Honduras invokes the *uti possidetis juris* of 1821 on the basis of land titles granted between 1719 and 1779. El Salvador on the contrary claims the major part of the area on the basis of post-independence *effectivités* or arguments of a human nature. It does however claim a portion of the area as part of the lands of the 1724 title of Arcatao.

In the second part, the essential question is the validity, extent and relationship to each other of the Arcatao title relied on by El Salvador and 18th century titles invoked by Honduras.

In the third part, the south-east section, there is a similar conflict between the Arcatao title and a lost title, that of Nombre de Jesús in the province of San Salvador, on the one hand, and the Honduran titles of San Juan de Arcatao, supplemented by the Honduran republican titles of La Virtud and San Sebastián del Palo Verde. El Salvador claims a further area, outside the asserted limits of the Arcatao and Nombre de Jesús titles, on the basis of *effectivités* and human arguments.

The Chamber first surveys the *uti possidetis juris* position on the basis of the various titles produced.

With regard to the first part of the third sector, the Chamber upholds Honduras's contention in principle that the position of the pre-independence provincial boundary is defined by two 18th century Honduran titles. After first reserving the question of precisely where their southern limits lay, since if the Chamber found in favour of El Salvador's claim based on *effectivités*, it would not have to be considered, the Chamber ultimately determines the boundary in this area on the basis of these titles.

As for the second part of the third sector, the Chamber considers it impossible to reconcile all the landmarks, distances and directions given in the various 18th century surveys: the most that can be achieved is a line which harmonizes with such features as are identifiable with a high degree of probability, corresponds more or less to the recorded distances and does not leave any major discrepancy unexplained. The Chamber considers that three features are identifiable and that these three reference points make it possible to reconstruct the boundary between the Province of Gracias a Dios and that of San Salvador in the area under consideration and thus the *uti possidetis juris* line, which the Chamber describes.

With regard to the third part of the sector, the Chamber considers that on the basis of the reconstructed 1742 title of Nombre de Jesús and the 1766 and 1786 surveys of San Juan de Arcatao, it is established that the *uti possidetis juris* line corresponded to the boundary between those two properties, which line the Chamber describes. In order to define the line more precisely the Chamber considers it legitimate to have regard to the republican titles granted by Honduras in the region, the line found by the Chamber being consistent with what it regards as the correct geographical location of those titles.

Having completed its survey of the *uti possidetis juris* position, the Chamber examines the claims made in the whole of the third sector on the basis of *effectivités*. Regarding the claims made by El Salvador on such grounds, the Chamber is unable to regard the relevant material as sufficient to affect its conclusion as to the position of the boundary. The Chamber reaches the same conclusion as regards the evidence of *effectivités* submitted by Honduras.

The Chamber's conclusion regarding the course of the boundary in the third sector is as follows:

> "From the Pacacio boundary marker ... along the río Pacacio upstream to a point ... west of the Cerro Tecolate or Los Tecolates; from there up the *quebrada* to the crest

of the Cerro Tecolato or Los Tecolates ... , and along the watershed of this hill as far as a ridge approximately 1 kilometer to the north-east ... ; from there in an easterly direction to the neighbouring hill above the source of the Torrente La Puerta ... and down that stream to where it meets the river Gualsinga ... ; from there the boundary runs along the middle of the river Gualsinga downstream to its confluence with the Sazalapa ... , and thence upstream along the middle of the river Sazalapa to the confluence with the river Sazalapa of the *quebrada* Llano Negro ... ; from there south-eastwards to the hill indicated ... , and thence to the crest of the hill marked on maps as being an elevation of 1,017 meters ... ; from there the boundary, inclining still more to the south, runs through the triangulation point known as La Cañada ... to the ridge joining the hills indicated on the El Salvador map as Cerro El Caracol and Cerro El Sapo ... , and from there to the feature marked on the maps as the Portillo El Chupa Miel ... ; from there following the ridge to the Cerro El Cajete ... , and thence to the point where the present-day road from Arcatao to Nombre de Jesús passes between the Cerro El Ocotillo and the Cerro Lagunetas ... ; from there south-eastwards, to the top of the hill ... marked on the maps with a spot height of 848 meters; from there slightly south of east to a small *quebrada*; eastwards down the bed of the *quebrada* to its junction with the river Amatillo or Gualcuquín ... ; the boundary then follows the middle of the Gualcuquín river downstream to the Poza del Cajón ... , the point where the next agreed sector of boundary begins."

VII. Fourth sector of the land boundary (paras. 186-267)

The fourth and longest disputed sector of the land boundary, also involving the largest area in dispute, lies between the source of the Orilla stream and the Malpaso de Similatón boundary marker (see sketch-map D).

The principal issue in this sector, at least as regards the size of the area concerned, is whether the boundary follows the river Negro-Quiagara, as Honduras contends, or a line contended for by El Salvador, some 8 kilometers to the north. In terms of the *uti possidetis juris* principle, the issue is whether or not the province of San Miguel, which on independence became part of El Salvador, extended to the north of that river or whether on the contrary the latter was in 1821 the boundary between that province and the province of Comayagua, which became part of Honduras. El Salvador relies on a title issued in 1745 to the communities of Arambala and Perquín in the province of San Miguel; the lands so granted extended north and south of the river Negro-Quiagara, but Honduras contends that, north of that river, the lands were in the province of Comayagua.

The Chamber first sets out the relevant events, in particular a dispute between the Indian community of Arambala and Perquín, in the province of San Miguel, and an Indian community established in Jocora or Jocoara in the province of Comayagua. The position of the boundary between the province of San Miguel and that of Comayagua was one of the main issues in the dispute between the two communities, which gave rise to a judicial decision of 1773. In 1815 a decision was issued by the *Real Audiencia* of Guatemala confirming the rights of the Indians of Arambala-Perquín. The Parties made extensive reference to these decisions in support of their contentions as to the location of the

boundary/ the Chamber is however reluctant to base a conclusion, one way or the other, on the 1773 decision and does not regard the 1815 one as wholly conclusive in respect of the location of the provisional boundary.

The Chamber then considers a contention by Honduras that El Salvador had in 1861 admitted that the Arambala-Perquin *ejidos* extended across the provincial boundary. It refers to a note of 14 May 1861 in which the Minister for Foreign Relations of El Salvador suggested negotiations to settle a long-standing dispute between the inhabitants of the villages of Arambala and Perquín, on the one hand, and the village of Jocoara, on the other, and to the report of surveyors appointed to resolve the inter-village dispute. It considers this note to be significant not only as, in effect, a recognition that the lands of the Arambala-Perquín community had, prior to independence, straddled the provincial boundary, but also as recognition that, as a result, they straddled the international frontier.

The Chamber then turns to the south-western part of the disputed boundary, referred to as the sub-sector of Colomoncagua: The problem here is, in broad terms, the determination of the extent of the lands of Colomoncagua, province of Comayagua (Honduras), to the west, and those of the communities of Arambala-Perquín and Torola, Province of San Miguel (El Salvador), to the east and south-east. Both Parties rely on titles and other documents of the colonial period; El Salvador has also submitted a remeasurement and renewed title of 1844. The Chamber notes that apart from the difficulties of identifying landmarks and reconciling the various surveys, the matter is complicated by doubts each Party casts on the regularity or relevance of titles invoked by the other.

After listing chronologically the titles and documents claimed by the one side or the other to be relevant, the Chamber assesses five of these documents to which the Parties took objection on various grounds.

The Chamber goes on to determine, on the basis of an examination of the titles and an assessment of the arguments advanced by the Parties by reference to them, the line of the *uti possidetis juris* in the sub-sector under consideration. Having established that the inter-provincial boundary was, in one area, the river Las Cañas, the Chamber relies on a presumption that such a boundary is likely to follow the river so long as its course is in the same general direction.

The Chamber then turns to the final section of the boundary between the river Las Cañas and the source of the Orilla stream (end-point of the sector). With respect to this section, the Chamber accepts the line claimed by Honduras on the basis of a title of 1653.

The Chamber next addresses the claim of El Salvador, based upon the *uti possidetis juris* in relation to the concept of *tierras realengas* (crown land), to areas to the west and south-west of the land comprised in the ejidos of Arambala Perquín, lying on each side of the river Negro-Quiagara, bounded on the west by the river Negro-Pichigual. The Chamber finds in favour of part of El Salvador's claim, south of the river Negro-Pichigual, but is unable to accept the remainder.

The Chamber has finally to deal with the eastern part of the boundary line, that between the river Negro-Quiagara and Malpaso de Similatón. An initial problem is that the Parties do not agree on the position of the Malpaso de Similatón, although this point defines one of the agreed sectors of the boundary as recorded in Article 16 of the 1980 Peace Treaty, the two locations contended for being 2,500 meters apart. The Chamber therefore concludes that there is a dispute between the Parties on this point, which it has to resolve.

The Chamber notes that this dispute is part of a disagreement as to the course of the boundary beyond the Malpaso de Similaton, in the sector which is deemed to have been agreed. While it does not consider that it has jurisdiction to settle disputed questions in an "agreed" sector, neither does it consider that the existence of such a disagreement affects its jurisdiction to determine the boundary up to and including the Malpaso de Similatón.

Noting that neither side has offered any evidence whatever as to the line of the *uti possidetis juris* in this region, the Chamber, being satisfied that this line is impossible to determine in this area, considers it right to fall back on equity *infra legem*, in conjunction with an unratified delimitation of 1869. The Chamber considers that it can in this case resort to the line then proposed in negotiations, as a reasonable and fair solution in all the circumstances, particularly since there is nothing in the records of the negotiations to suggest any fundamental disagreement between the Parties on that line.

The Chamber then considers the question of the *effectivités* El Salvador claims in the area north of the river Negro-Quiagara, which the Chamber has found to fall on the Honduran side of the line of the *uti possidetis juris*, as well as the areas outside those lands. After reviewing the evidence presented by El Salvador, the Chamber finds that, to the extent that it can relate various place-names to the disputed areas and to the *uti possidetis juris* boundary, it cannot regard this material as sufficient evidence of any kind of *effectivités* which could be taken into account in determining the boundary.

Turning to the *effectivités* claimed by Honduras, the Chamber does not see here sufficient evidence of Honduran *effectivités* to an area clearly shown to be on the El Salvador side of the boundary line to justify doubting that that boundary represents the *uti possidetis juris* line.

The Chamber's conclusion regarding the course of the boundary in the fourth disputed sector is as follows:

> "from the source of the Orilla stream ... the boundary runs through the pass of El Jobo to the source of the Cueva Hedionda stream ... , and thence down the middle of that stream to its confluence with the river Las Cañas ... , and thence following the middle of the river upstream as far as a point ... near the settlement of Las Piletas; from there eastwards over a col ... to a hill ... , and then north-eastwards to a point on the river Negro or Pichigual ... ; downstream along the middle of the river Negro or Pichigual to its confluence with the river Negro-Quiaguara ... ; then upstream along the middle of the river Negro-Quiaguara as far as the Las Pilas boundary marker ... , and from there in a straight line to the Malpaso de Similatón as identified by Honduras".

VIII. Fifth sector of the land boundary (paras. 268-305)

The fifth disputed sector extends from "the point on the north bank of the river Torola where it is joined by the Manzupucagua stream" to the Paso de Unire in the Unire river (see sketch-map E).

El Salvador's claim is based essentially on the *título ejidal* granted to the village of Polorós, Province of San Miguel, in 1760, following a survey; the boundary line El Salvador claims is what it considers to be the northern boundary of the lands comprised in that title, save for a narrow strip on the western side, claimed on the basis of "human arguments".

Honduras, while disputing El Salvador's geographic interpretation of the Polorós title, concedes that it extended across part of the river Torola, but nevertheless claims that the frontier today should follow that river. It contends that the northern part of the *ejidos* granted to Polorós in 1760, including all the lands north of the river and also extending south of it, had formerly been the land of San Miguel de Sapigre, a village which had disappeared owing to an epidemic some time after 1734, and that the village had been in the jurisdiction of Comayagua, so that those lands, although granted to Polorós, remained within that jurisdiction. It follows, according to Honduras, that the *uti possidetis juris* line ran along the boundary between those lands and the other Polorós lands; but Honduras concedes that as a result of events in 1854 it acquiesced in a boundary further north, formed by the Torola. Alternatively Honduras claims the Polorós lands north of the river on the basis that El Salvador acquiesced, in the 19th century, in the Torola as frontier. The western part of the disputed area, which Honduras considers to fall outside the Polorós title, is claimed by it as part of the lands of Cacaoterique, a village in the jurisdiction of Comayagua.

Noting that the title of Polorós was granted by the authorities of the province of San Miguel, the Chamber considers that it must be presumed that the lands comprised in the survey were all within the jurisdiction of San Miguel, a presumption which, the Chamber notes, is supported by the text.

After examining the available material as to the existence, location and extent of the village of San Miguel de Sapigre, the Chamber concludes that the claim of Honduras through that extinct village is not supported by sufficient evidence; it does not therefore have to go into the question of the effect of the inclusion in an *ejido* of one jurisdiction of *tierras realengas* of another. It concludes that the *ejido* granted in 1760 to the village of Polorós, in the Province of San Miguel, was wholly situated in that province and that accordingly the provincial boundary lay beyond the northern limit of that ejido or coincided with it. There being equally no evidence of any change in the situation between 1760 and 1821, the *uti possidetis juris* line may be taken to have been in the same position.

The Chamber then examines the claim of Honduras that, whatever the 1821 position, El Salvador had, by its conduct between 1821 and 1897, acquiesced in the river Torola as boundary. The conduct in question was the granting by the Government of El Salvador, in 1842, of a title to an estate that both parties claim was carved out of the ejidos of Polorós

and El Salvador's reaction, or lack of reaction, to the granting of two titles over lands north of the river Torola by Honduras in 1856 and 1879. From an examination of these events, the Chamber does not find it possible to uphold Hondura's claim that El Salvador acquiesced in the river Torola as the boundary in the relevant area.

The Chamber goes on to interpret the extent of the Polorós ejido as surveyed in 1760, on the face of the text and in the light of developments after 1821. Following a lengthy and detailed analysis of the Polorós title, the Chamber concludes that neither of the interpretations of it by the Parties can be reconciled with the relevant landmarks and distances; the inconsistency crystallized during the negotiations that led up to the unratified Cruz-Letona Convention in 1884. In the light of certain republican titles, the Chamber arrives at an interpretation of the Polorós title which, if not perfectly in harmony with all the relevant data, produces a better fit than either of the Parties' interpretations. As to neighbouring titles, the Chamber takes the view that, on the material available, no totally consistent mapping of the Polorós title and the survey of Cacaoterique can be achieved.

In the eastern part of the sector, the Chamber notes that the Parties agree that the river Unire constitutes the boundary of their territories for some distance upstream of the "Paso de Unire", but disagree as to which of two tributaries is to be regarded as the headwaters of the Unire. Honduras claims that between the Unire and the headwaters of the Torola the boundary is a straight line corresponding to the southwestern limit of the lands comprised in the 1738 Honduran title of San Antonio de Padua. After analyzing the Polorós title and 1682 and 1738 surveys of San Antonio, the Chamber finds that it is not convinced by the Honduran argument that the San Antonio lands extended westwards across the river Unire and holds that it was the river which was the *uti possidetis juris* line, as claimed by El Salvador.

To the west of the Polorós lands, since El Salvador's claim to land north of the river is based solely on the Polorós title (save for the strip on the west claimed on the basis of "human arguments"), the river Torola forms the boundary between the Polorós lands and the starting point of the sector. With regard to the strip of land claimed by El Salvador on the west, the Chamber considers that, for lack of evidence, this claim cannot be sustained.

Turning finally to the evidence of *effectivités* submitted by Honduras with respect to all six sectors, the Chamber concludes that this is insufficient to justify re-examining its conclusion as to the boundary line.

The Chamber's conclusion regarding the course of the boundary in the fifth disputed sector is as follows:

> "From the confluence with the river Torola of the stream identified in the General Treaty of Peace as the *quebrada* de Mansupucagua ... the boundary runs upstream along the middle of the river Torola as far as its confluence with a stream known as the *quebrada* del Arenal or *quebrada* de Aceituno ...; thence up the middle of the course of that stream as far as [a] point, at or near its source, ..., and thence in a

straight line somewhat north of east to a hill some 1,100 meters high ...; thence in a straight line to a hill near the river Unire ..., and thence to the nearest point on the river Unire; downstream along that river to the point known as the Paso de Unire ..."

IX. Sixth sector of the land boundary (paras. 306-322)

The sixth and final disputed sector of the land boundary is that between a point on the river Goascorán known as Los Amates, and the waters of the Gulf of Fonseca (see sketch-map F). Honduras contends that in 1821 the river Goascorán constituted the boundary between the colonial units to which the two States have succeeded, that there has been no material change in the course of the river since 1821, and that the boundary therefore follows the present stream flowing into the Gulf north-west of the Islas Ramaditas in the bay of La Unión. El Salvador however claims that it is a previous course followed by the river which defines the boundary and that this course can be traced and reaches the Gulf at Estero La Cutú.

The Chamber begins by examining an argument El Salvador bases on history. The Parties agree that during the colonial period a river called the Goascorán constituted the boundary between the province of San Miguel and the Alcadía Mayor de Minas of Tegucigalpa, and that El Salvador succeeded on independence to the territory of the province; but El Salvador denies that Honduras acquired any rights over the former territory of the Alcadía Mayor of Tegucigalpa, which according to El Salvador did not in 1821 belong to the province of Honduras but was an independent entity. The Chamber however observes that on the basis of the *uti possidetis juris*, El Salvador and Honduras succeeded to all the relevant colonial territories, leaving no *terra nullius*, and that the former Alcadía Mayor was at no time after 1821 an independent state additional to them. Its territory had to pass either to El Salvador or to Honduras and the Chamber understands it to have passed to Honduras.

The Chamber observes that El Salvador's argument of law, on the basis that the former bed of the river Goascorán forms the *uti possidetis juris* boundary, is that where a boundary is formed by the course of a river and the stream suddenly forms a new bed, this process of "avulsion" does not bring about a change in the boundary, which continues along the old channel. No record of an abrupt change of course having occurred has been brought to the Chamber's attention, but were the Chamber satisfied that the course was earlier so radically different from its present one, then an avulsion might reasonably be inferred. The Chamber notes that there is no scientific evidence that the previous course was such that the river debouched in the Estero La Cutú rather than in any of the other neighbouring inlets in the coastline.

El Salvador's case appears to be that if the change in the river's course occurred after 1821, the river was the boundary which under the *uti possidetis juris* had become the international frontier, and would have been maintained as it was by virtue of a rule of international law; if the course changed before 1821 and no further change took place after 1821, El Salvador's claim to the "old" course as the modern boundary would be based on a rule concerning avulsion which would be one not of international law but of Spanish colonial law. El Salvador has not committed itself to an opinion on the position of

the river in 1821, but does contend that a rule on avulsion supporting its claim was part of Spanish colonial law.

In the Chamber's view, however, any claim by El Salvador that the boundary follows an old course of the river abandoned at some time *before* 1821 must be rejected. It is a claim that was first made in 1972 and is inconsistent with the previous history of the dispute.

The Chamber then turns to the evidence concerning the course of the Goascorán in 1821. El Salvador relies on certain titles to private lands, beginning with a 1695 survey. Honduras produces land titles dating from the 17th and 19th centuries as well as a map or chart of the Gulf of Fonseca prepared by an expedition in 1794-1796, and a map of 1804.

The Chamber considers that the report of the expedition that led to the preparation of the 1796 map, and the map itself, leave little room for doubt that in 1821 the Goascorán was already flowing in its present-day course. It emphasizes that the 1796 map is not one which purports to indicate frontiers or political divisions, but the visual representation of what was recorded in the contemporary report. The Chamber sees no difficulty in basing a conclusion on the expedition report combined with the map.

The Chamber adds that similar weight may be attached to the conduct of the Parties in negotiations in 1880 and 1884. In 1884 it was agreed that the Goascorán river was to be regarded as the boundary between the two Republics, "from its mouth in the Gulf of Fonseca ... upstream as far as the confluence with the Guajiniquil or Pescado river ...", and the 1880 record refers to the boundary following the river from its mouth "upstream in a north-easterly direction", i.e., the direction taken by the present course, not the hypothetical old course of the river. The Chamber also observes that an interpretation of these texts as referring to the old course of the river is untenable in view of the cartographic material of the period, presumably available to the delegates, which pointed overwhelmingly to the river being then in its present course and forming the international boundary.

Referring to a suggestion by El Salvador that the river Goascorán would have returned to its old course had it not been prevented from so doing by a wall or dike built by Honduras in 1916, the Chamber does not consider that this allegation, even if proved, would affect its decision.

At its mouth in the Bay of La Unión the river divides into several branches, separated by islands and islets. Honduras has indicated that its claimed boundary passes to the north-west of these islands, thus leaving them all in Honduran territory. El Salvador, contending as it does that the boundary does not follow the present course of the Goascorán at all, has not expressed a view on Whether a line following that course should pass north-west of south-east of the islands or between them. The area at stake is very small and the islets involved do not seem to be inhabited or habitable. The Chamber considers, however, that it would not complete its task of delimiting the sixth sector were it to leave unsettled the question of the choice of one of the present mouths of the

Goascorán as the situation of the boundary line. It notes at the same time that the material on which to found a decision is scanty. After describing the position taken by Honduras since negotiations held in 1972, as well as its position during the work of the Joint Frontier Commission and in its submissions, the Chamber considers that it may uphold the relevant Honduran submissions in the terms in which they were presented.

The Chamber's conclusion regarding the sixth disputed sector is as follows:

> "From the point known as Los Amates ... the boundary follows the middle of the bed of the river Goascorán to the point where it emerges in the waters of the Bahia La Union, Gulf of Fonseca, passing to the north-west of the Islas Ramaditas."

X. Legal situation of the islands (paras. 323-368)

The major islands in the Gulf are indicated on sketch-map G annexed. El Salvador asks the Chamber to declare that it has sovereignty over all the islands within the Gulf except Zacate Grande and the Farallones; Honduras asks it to declare that only Meanguera and Meanguerita islands are in dispute between the Parties and that Honduras has sovereignty over them.

In the view of the Chamber the provision of the Special Agreement that it determine "*la situación jurídica insular*" confers upon it jurisdiction in respect of all the islands of the Gulf. A judicial determination, however, is only required in respect of such islands as are in dispute between the Parties; this excludes, *inter alia*, the Farallones, which are recognized by both Parties as belonging to Nicaragua.

The Chamber considers that *prima facie* the existence of a dispute over an island can be deduced from the fact of its being the subject of specific and agreed claims. Noting that El Salvador has pressed its claim to El Tigre island with arguments in support and that Honduras has advanced counter-arguments, though with the object of whowing that there is no dispute over El Tigre, the Chamber considers that, either since 1985 or at least since issue was joined in these proceedings, the islands in dispute are El Tigre, Meanguera and Meanguerita.

Honduras contends however that, since the 1980 General Treaty of Peace uses the same terms as Article 2, paragraph 2, of the Special Agreement, the jurisdiction of the Chamber must be limited to the islands in dispute at the time the Treaty was concluded, i.e., Meanguera and Meanguerita, the Salvadorian claim to El Tigre having been made only in 1985. The Chamber however observes that the question whether a given island is in dispute is relevant, not to the question of the existence of jurisdiction, but to that of its exercise. Honduras also claims that there is no real dispute over El Tigre, which has since 1854 been recognized by El Salvador as belonging to Honduras, but that El Salvador has made a belated claim to it as a political or tactical move. The Chamber notes that for it to find that there is no dispute would require it first to determine that El Salvador's claim is wholly unfounded, and to do so can hardly be viewed as anything but the determination of a dispute. The Chamber therefore concludes that it should determine whether Honduras or El Salvador has jurisdiction over each of the islands of El Tigre, Meanguera and Meanguerita.

Honduras contends that by virtue of Article 26 of the General Treaty of Peace the law applicable to the dispute is solely the *uti possidetis juris* of 1821, while El Salvador maintains that the Chamber has to apply the modern law on acquisition of territory and look at the effective exercise or display of State sovereignty over the islands as well as historical titles.

The Chamber has no doubt that the determination of sovereignty over the islands must start with the *uti possidetis juris*. In 1821, none of the islands of the Gulf, which had been under the sovereignty of the Spanish Crown, were *terra nullius*. Sovereignty over them could therefore not be acquired by occupation and the matter was thus one of the succession of the newly-independent States to the islands. The Chamber will therefore consider whether the appurtenance in 1821 of each disputed island to one or the other of the various administrative units of the Spanish colonial structure can be established, regard being had not only to legislative and administrative texts of the colonial period, but also to "colonial *effectivités*". The Chamber observes that in the case of the islands the legal and administrative texts are confused and conflicting, and that it is possible that Spanish colonial law gave no clear and definite answer as to the appurtenance of some areas. It therefore considers it particularly appropriate to examine the conduct of the new States during the period immediately after 1821. Claims then made, and the reaction -- or lack of reaction -- to them may throw light on the contemporary appreciation of what the situation in 1821 had been, or should be taken to have been.

The Chamber notes that El Salvador claims all the islands in the Gulf (except Zacate Grande) on the basis that during the colonial period they were within the jurisdiction of the township of San Miguel in the colonial province of San Salvador, which was in turn within the jurisdiction of the *Real Audiencia* of Guatemala. Honduras asserts that the islands formed part of the bishopric and province of Honduras, that the Spanish Crown had attributed Meanguera and Meanguerita to that province and that ecclesiastical jurisdiction over the islands appertained to the parish of Choluteca and the Guardania of Nacaome, assigned to the bishopric of Comayagua. honduras has also presented an array of incidents and events by way of colonial *effectivités*.

The fact that the ecclesiastical jurisdiction has been relied on as evidence of "colonial *effectivités*" presents difficulties, as the presence of the church on the islands, which were sparsely populated, was not permanent.

The Chamber's task is made more difficult by the fact that many of the historical events relied on can be, and have been, interpreted in different ways and thus used to support the arguments of either Party.

The Chamber considers it unnecessary to analyze in further detail the arguments each Party advances to show that it acquired sovereignty over some or all of the islands by the application of the *uti possidetis juris* principle, the material available being too fragmentary and ambiguous to admit on any firm conclusion. The Chamber must therefore consider the post-independence conduct of the Parties, as indicative of what must have been the 1821 position. This may be supplemented by considerations independent of the *uti possidetis juris* principle, in particular the possible significance of

the conduct of the Parties as constituting acquiescence. The Chamber also notes that under Article 26 of the General Treaty of Peace, it may consider all "other evidence and arguments of a legal, historical, human or other kind, brought before it by the Parties and admitted under international law".

The law of acquisition of territory, invoked by El Salvador, is in principle clearly established and buttressed by arbitral and judicial decisions. The difficulty with its application here is that it was developed primarily to deal with the acquisition of sovereignty over terra nullius. Both Parties however assert a title of succession from the Spanish Crown, so that the question arises whether the exercise or display of sovereignty by the one Party, particularly when coupled with lack of protest by the other, could indicate the presence of an *uti possidetis juris* title in the former Party, where the evidence based on titles of colonial *effectivités* is ambiguous. The Chamber notes that in the *Minguiers and Ecrehos* case in 1953 the Court did not simply disregard the ancient titles and decide on the basis of more recent displays of sovereignty.

In the view of the Chamber, where the relevant administrative boundary in the colonial period was ill-defined or its position disputed, the behaviour of the two States in the years following independence may serve as a guide to where the boundary was, either in their shared view, or in the view acted on by one and acquiesced in by the other.

Being uninhabited or sparsely inhabited, the islands did not arouse any interest of dispute until the years nearing the mid-19th century. What then occurred appears to be highly material. The islands were not *terra nullius* and in legal theory each island already appertained to one of the Gulf States as heir to the appropriate part of the Spanish colonial possession, which precluded acquisition by occupation; but effective possession by one of the States of an island could constitute a post-colonial effectivité, throwing light on the contemporary appreciation of the legal situation. Possession backed by the exercise of sovereignty may confirm the *uti possidetis juris* title. The Chamber does not find it necessary to decide whether such possession could be recognized even in contradiction of such a title, but in the case of the islands, where the historical material of colonial times is confused and contradictory and independence was not immediately followed by unambiguous acts of sovereignty, this is practically the only way in which the *uti possidetis juris* could find formal expression.

The Chamber deals first with El Tigre, and reviews the historical events concerning it from 1833 onward. Noting that Honduras has remained in effective occupation of the island since 1849, the Chamber concludes that the conduct of the Parties in the years following the dissolution of the Federal Republic of Central America was consistent with the assumption that El Tigre appertained to Honduras. Given the attachment of the Central American States to the principle of *uti possidetis juris*, the Chamber considers that that contemporary assumption also implied belief that Honduras was entitled to the island by succession from Spain, or, at least, that such succession by Honduras was not contradicted by any known colonial title. Although Honduras has not formally requested a finding of its sovereignty over El Tigre, the Chamber considers that it should define its legal situation by holding that sovereignty over El Tigre belongs to Honduras.

Regarding Meanguera and Meanguerita, the Chamber observes that throughout the argument the two islands were treated by both Parties as constituting a single insular unity. The smallness of Meanguerita, its contiguity to the larger island, and the fact that it is uninhabited allow its characterization as a "dependency" of Meanguera. That Meanguerita is "capable of appropriation" is undoubted: although without fresh water, it is not a low-tide elevation and is covered by vegetation. The Parties have treated it as capable of appropriation, since they claim sovereignty over it.

The Chamber notes that the initial formal manifestation of the dispute occurred in 1854, when a circular letter made widely known El Salvador's claim to the island. Furthermore, in 1856 and 1879 El Salvador's official journal carried reports concerning administrative acts relating to it. The Chamber has seen no record of reactions or protest by Honduras over these publications.

The Chamber observes that from the late 19th century the presence of El Salvador on Meanguera intensified, still without objection or protest from Honduras, and that it has received considerable documentary evidence on the administration of Meanguera by El Salvador. Throughout the period covered by that documentation there is no record of any protest by Honduras, with the exception of one recent event, described later. Furthermore, El Salvador called a witness, a Salvadorian resident of the island, and his testimony, not challenged by Honduras, shows that El Salvador has exercised State power over Meanguera.

According to the material before the Chamber, it was only in January 1991 that the Government of Honduras made protests to the Government of El Salvador concerning Meanguera, which were rejected by the latter Government. The Chamber considers that the Honduran protest was made too late to affect the presumption of acquiescence on the part of Honduras. The conduct of Honduras vis-à-vis earlier *effectivités* reveals some form of tacit consent to the situation.

The Chamber's conclusion is thus the following. In relation to the islands, the "documents which were issued by the Spanish Crown or by any other Spanish authority, whether secular or ecclesiastical", do not appear sufficient to "indicate the jurisdictions or limits of territories or settlements" in terms of Article 26 of that Treaty, so that no firm conclusion can be based upon such material, taken in isolation, for deciding between the two claims to an *uti possidetis juris* title. Under the final sentence of Article 26, the Chamber is however entitled to consider both the effective interpretation of the *uti possidetis juris* by the Parties, in the years following independence, as throwing light on the application of the principle, and the evidence of effective possession and control of an island by one Party without protest by the other, as pointing to acquiescence. The evidence as to possession and control, and the display and exercise of sovereignty, by Honduras over El Tigre and by El Salvador over Meanguera (to which Meanguerita is an appendage), coupled in each case with the attitude of the other Party, clearly shows that Honduras was treated as having succeeded to Spanish sovereignty over El Tigre, and El Salvador to Spanish sovereignty over Meanguera and Meanguerita.

XI. Legal situation of the maritime spaces (paras. 369-420)

The Chamber first recalls that Nicaragua had been authorized to intervene in the proceedings, but solely on the question of the legal régime of the waters of the Gulf of Fonseca. Referring to complaints by the Parties that Nicaragua had dealt with matters beyond the limits of its permitted intervention, the Chamber observes that it has taken account of Nicaragua's arguments only where they appear relevant in its consideration of the régime of the waters of the Gulf of Fonseca.

The Chamber then refers to the disagreement between the Parties on whether Article 2, paragraph 2, of the Special Agreement empowers or requires the Chamber to delimit a maritime boundary, within or without the Gulf. El Salvador maintains that "the Chamber has no jurisdiction to effect any delimitation of the maritime spaces", whereas Honduras seeks the delimitation of the maritime boundary inside and outside the Gulf. The Chamber notes that these contentions have to be seen in relation to the position of the Parties as to the legal status of the Gulf waters: El Salvador claims that they are subject to a condominium in favour of the three coastal States and that delimitation would therefore be inappropriate, whereas Honduras argues that within the Gulf there is a community of interests which necessitates a judicial delimitation.

In application of the normal rules of treaty interpretation (Article 31 of the Vienna Convention of the Law of Treaties), the Chamber first considers what is the "ordinary meaning" of the terms of the Special Agreement. It concludes that no indication of a common intention to obtain a delimitation from the Chamber can be derived from the text as it stands. Turning to the context, the Chamber observes that the Special Agreement used the wording "to delimit the boundary line" regarding the land frontier, while confining the task of the Chamber as it relates to the islands and maritime spaces to "determine [their] legal situation", the same contrast of wording being observed in Article 18, paragraph 2, of the General Treaty of Peace. Noting that Honduras itself recognizes that the island dispute is not a conflict of delimitation but of attribution of sovereignty over a detached territory, the Chamber observes that it is difficult to accept that the wording "to determine the legal situation", used for both the islands and the maritime spaces, would have a completely different meaning regarding the islands and regarding maritime spaces.

Invoking the principle of effectiveness, Honduras argues that the context of the Treaty and the Special Agreement militate against the Parties having intended merely a determination of the legal situation of the spaces unaccompanied by delimitation, the object and purpose of the Special Agreement being to dispose completely of a longstanding corpus of disputes. In the Chamber's view, however, in interpreting a text of this kind, regard must be had to the common intention as it is expressed. In effect, what honduras is proposing is recourse to the "circumstances" of the conclusion of the Special Agreement, which constitute no more than a supplementary means of interpretation.

To explain the absence of any specific reference to delimitation in the Special Agreement, Honduras points to a provision in the Constitution of El Salvador such that its representatives could never have intended to sign a special agreement contemplating

any delimitation of the waters of the Gulf. Honduras contends that it was for this reason that the expression "determine the legal situation" was chosen, intended as a neutral term which would not prejudice the position of either Party. The Chamber is unable to accept this contention, which amounts to a recognition that the Parties were unable to agree that the Chamber should have jurisdiction to delimit the waters of the Gulf. It concludes that the agreement between the Parties, expressed in Article 2, paragraph 2, of the Special Agreement, that the Chamber should determine the legal situation of the maritime spaces did not extend to their delimitation.

Relying on the fact that the expression "determine the legal situation of the island and the maritime spaces" is also used in Article 18 of the General Treaty of Peace of 1980, defining the role of the Joint Frontier Commission, Honduras invokes the subsequent practice of the Parties in the application of the Treaty and invites the Chamber to take into account the fact that the Joint Frontier Commission examined proposals aimed at such delimitation. The Chamber considers that, while both customary law and the Vienna Convention on the Law of Treaties (Art. 31, para. 3 (*b*)) allow such practice to be taken into account for purposes of interpretation, none of the considerations raised by Honduras can prevail over the absence from the text of any specific reference to delimitation.

The Chamber then turns to the legal situation of the waters of the Gulf, which falls to be determined by the application of "the rules of international law applicable between the Parties, including where pertinent, the provisions of the General Treaty of Peace", as provided in Articles 2 and 5 of the Special Agreement.

Following a description of the geographical characteristics of the Gulf, the coastline of which is divided between El Salvador, Honduras and Nicaragua (see sketch-map G annexed) and the conditions of navigation within it, the Chamber points out that the dimensions and proportions of the Gulf are such that it would nowadays be a juridical bay under the provisions (which might be found to express general customary law) of the Convention on the Territorial Sea and the Contiguous Zone (1958) and the Convention on the Law of the Sea (1982), the consequence being that, if it were a single-State bay, a closing line might now be drawn and the waters be thereby enclosed and "considered as internal waters". The Parties, the intervening State, as well as commentators generally, are agreed that the Gulf is an historic bay, and that its waters are accordingly historic waters. Such waters were defined in the Fisheries case between the United Kingdom and Norway as "waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title" (*I.C.J. Reports 1951*, p. 130). This should be read in the light of the observation in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, that

"general international law ... does not provide for a single 'régime' for 'historic waters' or 'historic bays', but only for a particular régime for each of the concrete, recognized cases of 'historic waters' or 'historic bays'" (*I.C.J. Reports 1982*, p. 74).

The Court concludes that it is clearly necessary to investigate the particular history of the Gulf to discover the "régime" resulting therefrom, adding that the particular historical régime established by practice must be especially important in a pluri-State bay, a kind of

bay for which there are notoriously no agreed and qualified general rules of the kind so well established for single-State bays.

Since its discovery in 1522 until 1821, the Gulf was a single-State bay the waters of which were under the single sway of the Spanish Crown. The rights in the Gulf of the present coastal States were thus acquired, like their land territories, by succession from Spain. The Chamber must therefore enquire into the legal situation of the waters of the Gulf in 1821; for the principle of *uti possidetis juris* should apply to those waters as well as to the land.

The legal status of the Gulf waters after 1821 was a question which faced the Central American Court of Justice in the case between El Salvador and Nicaragua concerning the Gulf in which it rendered its Judgement of 9 March 1917. That Judgement, which examined the particular régime of the Gulf of Fonseca, must therefore be taken into consideration as an important part of the Gulf's history. The case before the Central American Court was brought by El Salvador against Nicaragua because of the latter's entry into the Bryan-Chamorro Treaty of 1914 with the United States, by which Nicaragua granted the latter a concession for the construction of an interoceanic canal and of a naval base in the Gulf, an arrangement that would allegedly prejudice El Salvador's own rights in the Gulf.

On the underlying question of the status of the waters of the Gulf there were three matters which practice and the 1917 Judgement took account of: first, the practice of all three coastal States had established and mutually recognized as 1 marine league (3 nautical miles) littoral maritime belt off their respective mainland coasts and islands, in which belt they each exercised an exclusive jurisdiction and sovereignty, though with rights of innocent passage conceded on a mutual basis/ second, all three States recognized a further belt of 3 marine leagues (9 nautical miles) for rights of "maritime inspection" for fiscal purposes and for national security; third, there was an Agreement of 1900 between Honduras and Nicaragua by which a partial maritime boundary between the two States had been delimited, which, however, stopped well short of the waters of the main entrance to the bay.

Furthermore the Central American Court unanimously held that the Gulf "is an historic bay possessed of the characteristics of a closed sea" and that "... the parties are agreed that the Gulf is a closed sea ..."; by "closed sea" the Court seems to mean simply that it is not part of the high seas and its waters are not international waters. A another point the Judgement describes the Gulf as "an historic or vital bay".

The Chamber then points out that the term "territorial waters" used in the Judgement did not then necessarily indicate what would now be called "territorial sea"; and explains what might appear to be an inconsistency in the Judgement concerning rights of "innocent use", which are at odds with the present general understanding of the legal status of the waters of a bay as constituting "internal waters". The Chamber observes that the rules and principles normally applicable to single-State bays are not necessarily appropriate to a bay which is a pluri-State bay and also a historic one. Moreover, there is a need for shipping to have access to any of the three coastal States through the main channels

between the bay and the ocean. Rights of innocent passage are not inconsistent with a régime of historic waters. There is furthermore the practical point that since these waters were outside the 3-mile maritime belt of exclusive jurisdiction in which innocent passage was nevertheless recognized in practice, it would have been absurd not to recognize passage rights in these waters, which have to be crossed in order to reach those maritime belts.

All three coastal States continue to claim that the Gulf is an historic bay with the character of a closed sea, and it seems also to continue to be the subject of the "acquiescence on the part of other nations" to which the 1917 Judgement refers; moreover that position has been generally accepted by commentators. The problem is the precise character of the sovereignty the three coastal States enjoy in these historic waters. Recalling the former view that in a pluri-State bay, if it is not historic waters, the territorial sea follows the sinuosities of the coast and the remainder of the waters of the bay are part of the high seas, the Chamber notes that this solution is not possible in the case of the Gulf of Fonseca since it is an historic bay and therefore a "closed sea".

The Chamber then quotes the holding by the Central American Court that "... the legal status of the Gulf of Fonseca ... is that of property belonging to the three countries that surround it ..." and that "... the high parties are agreed that the waters which form the entrance to the Gulf intermingle ...". In addition the Judgement recognized that maritime belts of 1 marine league from the coast were within the exclusive jurisdiction of the coastal State and therefore should "be excepted from the community of interests or ownership". After quoting the paragraphs of the Judgement setting forth the Court's general conclusions, the Chamber observes that the essence of its decision on the legal status of the waters of the Gulf was that these historic waters were then subject to a "co-ownership" (*condominio*) of the three coastal States.

The Chamber notes that El Salvador approves strongly of the condominium concept, and holds that this status not only prevails but also cannot be changed without its consent. Honduras opposes the condominium idea and accordingly calls in question the correctness of this part of the 1917 Judgement, whilst also relying on the fact that it was not a party to the case and so cannot be bound by the decision. Nicaragua is, and has consistently been, opposed to the condominium solution.

Honduras also argues against the condominium on the ground that condominia can only be established by agreement. It is doubtless right in claiming that condominia, in the sense of arrangements for the common government of territory, have ordinarily been created by treaty. But what the Central American Court had in mind was a joint sovereignty arising as a juridical consequence of the 1821 succession. State succession is one of the ways in which territorial sovereignty passes from one State to another and there seems no reason in principle why a succession should not create a joint sovereignty where a single and undivided maritime area passes to two or more new States. The Chamber thus sees the 1917 Judgement as using the term condominium to describe what it regards as the joint inheritance by three States of waters which had belonged to a single State and in which there were no maritime administrative boundaries in 1821 or indeed at the end of the Federal Republic of Central America in 1839.

Thus the *ratio decidendi* of the Judgement appears to be that there was, at the time of independence, no delimitation between the three countries; and the waters of the Gulf have remained undivided and in a state of community which entails a condominium or co-ownership. Further the existence of a community was evidenced by continued and peaceful use of the waters by all the riparian States after independence.

As regards the status of the 1917 Judgement, the Chamber observes that although the Court's jurisdiction was contested by Nicaragua, which also protested the Judgement, it is nevertheless a valid decision of a competent court. Honduras, which, on learning of the proceedings before the Court, formally protested to El Salvador that it did not recognize the status of co-ownership in the waters of the Gulf, has, in the present case, relied on the principle that a decision in a judgment or an arbitral award can only be opposed to the parties. Nicaragua, a party to the 1917 case, is an intervener but not a Party in the present one. It therefore does not appear that the Chamber is required to pronounce upon the question whether the 1917 Judgement is *res judicata* between the States parties to it, only one of which is a Party to the present proceedings, a question which is not helpful in a case raising a question of the joint ownership of three coastal States. The Chamber must make up its own mind on the status of the waters of the Gulf, taking such account of the 1917 decision as it appears to the Chamber to merit.

The opinion of the Chamber on the régime of the historic waters of the Gulf parallels the opinion expressed in the 1917 Judgement. The Chamber finds that, reserving the question of the 1900 Honduras/Nicaragua delimitation, the Gulf waters, other than the 3-mile maritime belt, are historic waters and subject to a joint sovereignty of the three coastal States, basing itself on the following reasons. As to the historic character of the Gulf waters, there are the consistent claims of the three coastal States and the absence of protest from other States. As to the character of rights in the waters of the Gulf, these were waters of a single State bay during the greater part of their known history and were not divided or apportioned between the different administrative units which became the three coastal States. There was no attempt to divide ad delimit the waters according to the principle of *uti possidetis juris*, this being a fundamental difference between the land areas and the maritime area. The delimitation effected between Nicaragua and Honduras in 1900, which was substantially an application of the method of equidistance, gives no clue that it was in any way inspired by the application of the *uti possidetis juris*. A joint succession of the three States to the maritime area therefore seems to be the logical outcome of the principle of *uti possidetis juris* itself.

The Chamber notes that Honduras, whilst arguing against the condominium, does not consider it sufficient simply to reject it, but proposes an alternative idea, that of "community of interests" or of "interest". That there is a community of interests of the three coastal States of the Gulf is not open to doubt, but it seems odd to postulate such a community as an argument against a condominium, which is almost an ideal embodiment of the community of interest requirements of equality of user, common legal rights and the "esclusion of any preferential privilege". The essential feature of the "community of interests" existing, according to Honduras, in respect of the waters of the Gulf, and which distinguishes it from the condominio referred to by the Central American Court or the condominium asserted by El Salvador, is that the "community of interests" does not merely permit of a delimitation but necessitates it.

El Salvador for its part is not suggesting that the waters subject to joint sovereignty cannot be divided, if there is agreement to do so. What it maintains is that a decision on the status of the waters is an essential prerequisite to the process of delimitation. Moreover the geographical situation of the Gulf is such that mere delimitation without agreement on questions of passage and access would leave many practical problems unsolved.

The Chamber notes that the normal geographical closing line of the bay would be the line Punta Amapala to Punta Cosigüina; it rejects a thesis elaborated by El Salvador of an "inner gulf" and an "outer gulf", based on a reference in the 1917 Judgement to an inner closing line, there being nothing in that Judgement to support the suggestion that Honduran legal interests in the Gulf waters were limited to the area inside the inner line. Recalling that there had been considerable argument between the Parties about whether the closing line of the Gulf is also a baseline, the Chamber accepts the definition of it as the ocean limit of the Gulf, which however must be the baseline for whatever régime lies beyond it, which must be different from that of the Gulf.

As to the legal status of the waters inside the Gulf closing line other than the 3-mile maritime belts, the Chamber considers whether or not they are internal waters"; noting that rights of passage through them must be available to vessels of third States seeking access to a port in any of the three coastal States, it observes that it might be sensible to regard those waters, in so far as they are the subject of the condominium or co-ownership, as *sui generis*. The essential juridical status of these waters is however the same as that of internal waters, since they are claimed *à titre de souverain* and are not territorial sea.

With regard to the 1900 Honduran/Nicaraguan delimitation line, the Chamber finds, from the conduct of El Salvador, that the existence of the delimitation has been accepted by it in the terms indicated in the 1917 Judgement.

In connection with any delimitation of the waters of the Gulf, the Chamber finds that the existence of joint sovereignty in all the waters subject to a condominium other than those subject to the treaty or customary delimitations means that Honduras has existing legal rights (not merely an interest) in the Gulf waters up to the bay closing line, subject of course to the equivalent rights of El Salvador and Nicaragua.

Regarding the question of the waters outside the Gulf, the Chamber observes that it involves entirely new concepts of law unthought-of in 1917, in particular continental shelf and the exclusive economic zone. There is also a prior question about territorial sea. The littoral maritime belts of 1 marine league along the coastlines of the Gulf are not truly territorial seas in the sense of the modern law of the sea. For a territorial sea normally has beyond it the continental shelf, and either waters of the high seas or an exclusive economic zone and the maritime belts within the Gulf do not have outside them any of these areas. The maritime belts may properly be regarded as the internal waters of the coastal State, even though subject, as indeed are all the waters of the Gulf, to rights of innocent passage.

The Chamber therefore finds that there is a territorial sea proper seawards of the closing line of the Gulf and, since there is a condominium of the waters of the Gulf, there is a tripartite presence at the closing line and Honduras is not locked out from rights in respect of the ocean waters outside the bay. It is only seaward of the closing line that modern territorial seas can exist, since otherwise the Gulf waters could not be waters of an historic bay, which the Parties and the intervening State agree to be the legal position. And if the waters internal to that bay are subject to a threefold joint sovereignty, it is the *three* coastal States that are entitled to territorial sea outside the bay.

As for the legal régime of the waters, seabed and subsoil off the closing line of the Gulf, the Chamber first observes that the problem must be confined to the area off the baseline but excluding a 3-mile, or 1 marine league, strip of it at either extremity, corresponding to the existing maritime belts of El Salvador and Nicaragua respectively. At the time of the Central American Court's decision the waters outside the remainder of the baseline were high seas. Nevertheless the modern law of the sea has added territorial sea extending from the baseline, has recognized continental shelf as extending beyond the territorial sea and belonging *ipso jure* to the coastal State, and confers a right on the coastal State to claim an exclusive economic zone extending up to 200 miles from the baseline of the territorial sea.

Since the legal situation on the landward side of the closing line is one of joint sovereignty, it follows that all three of the joint sovereigns must be entitled outside the closing line to territorial sea, continental shelf and exclusive economic zone. Whether this situation should remain in being or be replaced by a division and delimitation into three separate zones is, as inside the Gulf also, a matter for the three States to decide. Any such delimitation of maritime areas will fall to be effected by agreement on the basis of international law.

XII. Effect of Judgment for the intervening State (paras. 421-424)

Turning to the question of the effect of its Judgment for the intervening State, the Chamber observes that the terms in which intervention was granted were that Nicaragua would not become party to the proceedings. Accordingly the binding force of the Judgment for the Parties, as contemplated by Article 59 of the Statute of the Court, does not extend to Nicaragua as intervener.

In its Application for permission to intervene, Nicaragua had stated that it "intends to subject itself to the binding effect of the decision", but from the written statement submitted by Nicaragua it is clear that Nicaragua does not now regard itself as obligated to treat the Judgment as binding upon it. With regard to the effect, if any, of the statement in Nicaragua's Application, the Chamber, notes that its Judgment of 13 September 1990 emphasized the need, if an intervener is to become a party, for the consent of the existing parties to the case; it observes that if an intervener becomes a party, and is thus bound by the judgment, it becomes entitled equally to assert the binding force of the judgment against the other parties. Noting that neither Party has given any indication of consent to Nicaragua's being recognized to have any status enabling it to rely on the Judgment, the Chamber concludes that in the circumstances of the case the Judgment is not *res judicata* for Nicaragua.

Annex

Declaration of Judge Oda

On the subject of Nicaragua's intervention, judge Oda, in an appended declaration, disputes the Chamber's findings as to its Judgment's lack of binding effect upon the intervening State. Though not a party to the case, Nicaragua will in his view certainly be bound by the Judgment in so far as it relates to the legal situation of the maritime spaces of the Gulf, and he refers in that connection to this views on the general subject of the effects of Judgments on intervening States as expressed in two previous cases.

Judge Oda states that, by his declaration, he does not, however, intend to lend his accord to the Chamber's findings on the maritime spaces dispute, the subject of his dissenting opinion.

Separate opinion of Judge ad hoc Valticos

The scope of the uti possidetis juris principle and the effectivités

The application of the *uti possidetis juris* principle has given rise to difficulties inasmuch as the rights involved could date back several centuries and it has not been easy to determine those that were relevant in determining the boundaries in question. According to the opinion summarized, in view of the conditions in which and the reasons for which they were granted, the issue of títulos ejidales could not be disregarded for purposes of delimiting the boundaries.

Furthermore, the role given to the *effectivités* has been insufficient.

In any event, the care the Chamber has taken to resolve the difficulties it has met is worthy of praise.

Tepangüisir sector. While in various respects the author of the opinion concurs with the views of the Chamber, he believes that the boundary drawn to the west of Talquezalar should have run in a north-westerly direction, towards the Cerro Oscuro, before once again turning downward (in a south-westerly direction towards the tripoint of Montecristo).

Sazalapa-Arcatao sector. The Chamber based itself on various questionable titles, as a result of which it cut back El Salvador's claims excessively, particulary with regard to two protrusions to the north-west and the north-east of the area in question, as well as in the central part, at the level of the so-called Gualcimaca title.

Naguaterique sector. The author of the opinion disagrees with the boundary line drawn by the Chamber along the river Negro-Ouiagara. He sets forth his reasons for prefering the Cerro La Ardilla line.

Dolores sector. The 1760 title concerning Polorós should take precedence in this regard and the boundary should run to the north of the river Torola. The difficulty is due to the

distances and the area mentioned in the title. The Chamber has therefore decided to grant El Salvador, in this area, a quadrilateral considerably smaller than what that State Claimed. But this solution has involved a questionable change in the names of the summits and rivers concerned.

The maritime spaces. Despite the serious objections to which they are open, the author of the opinion feels that the arguments endorsed by the majority of the Chamber are acceptable, regard being had to the special character of the Gulf of Fonseca as a historic bay with three coastal States.

With regard to the various other points (concerning the land, the islands and the waters within the Gulf), the author of the opinion concurs fully with the views of the Chamber.

Separate Opinion of Judge ad hoc Torres Bernárdez

In his Separate Opinion, Judge Torres Bernárdez gives the reasons for his overall concurrence with the Judgment of the Chamber and for his having voted for all its operative part, with the exception of the decisions concerning the attribution of sovereignty over the island of Meanguerita and the interpretation of Article 2, paragraph 2, of the Special Agreement. Following an introduction underlining the unity of the case as well as its fundamental, although not exclusive, State succession character, the considerations, observations and reservations contained in the Opinion are presented under the main headings of the three major aspects of the case, namely the "land boundary dispute", the "island dispute", and the "maritime dispute".

Judge Torres Bernárdez stresses the importance of the *uti possidetis juris* principle as the fundamental norm applicable to the case, examining in this connection the contents, object and purpose of the *uti possidetis juris* as customarily understood by the Spanish-American Republics, and the relationship between that principle and the *effectivités* invoked in the case, as well as the question of the proof of the *uti possidetis juris* principle, the evidentiary value of the *títulos ejidales* submitted by the Parties included. Judge Torres Bernárdez approves the Chamber's general concentration on applying the *uti possidetis juris* principle in the light of the fundamental State succession character of the case and the fact that both Parties are Spanish-American Republics. However, Article 5 of the Special Agreement does not exclude the application, wherever pertinent, of other rules of international law also binding the Parties. The principle of *consent*, including any consent implied by the conduct of the Parties subsequent to the critical date of 1821, is for Judge Torres Bernárdez one of those rules of international law which also applied in the case in various ways (element of confirmation or interpretation of the 1821 *uti possidetis juris*; establishment of *effectivités* alleged; determination of situations of "acquiescence" or "recognition").

Regarding the *land boundary dispute*, Judge Torres Bernárdez considers the overall results of the application by the Chamber of the law described to the six sectors in dispute to be as a whole satisfactory, having regard to the evidence submitted by the Parties; subject to a few specific reservations, the frontier line defined for each of those sectors by the Judgement are *de jure* lines by virtue either of the 1821 *uti possidetis juris* or for the

consent derived from conduct of the Parties, or of both. His specific reservations concern the line between Talquezalar and Piedra Menuda in the first sector (the question of the Tepangüisir boundary marker and corresponding indentation), the line between Las Lagunetas or Portillo de Las Lagunetas and Poza del Cajón in the third sector (the Gualcuquín or El Amatillo river line) and the Las Cañas river line of the frontier in the fourth sector, particularly the segment of that line running from the Torola lands down to the Mojón of Champate. Judge Torres Bernárdez voted, however, in favour of the frontier line defined by the Judgment for the six sectors, out of the conviction that those lines are "as a whole" de jure lines as requested by the Parties in Article 5 of the Special Agreement.

So far as the *island* dispute is concerned, Judge Torres Bernárdez upholds the submission of the Republic of Honduras that Meanguerita were the only *islands in dispute* as between the Parties at the current proceedings. He dissociates himself, therefore, from the finding of the majority that El Tigre was also an island *in dispute*, as well as from the reasoning of the Judgment as to the definition of the *islands in dispute*: both the finding and the reasoning are contrary to the stability of international relations and do not correspond to basic tenets of international relations and to not correspond to basic tenets of international judicial law. A *non-existing dispute* objection formally submitted by a party has an autonomy of its own, should be determined as a preliminary matter on the basis of the objective grounds provided by the case file as a whole and should not be disposed of by subsuming it into the different matters of the existence of jurisdiction and its exercise. Judge Torres Bernárdez stresses his view that, as a consequence of the approach followed by the majority, the Judgment concludes by stating the obvious, namely that the island of El Tigre is part of the sovereign territory of the Republic of Honduras. Honduras had not requested the Chamber to pronounce any such "confirmation" of its sovereignty of El Tigre, a sovereignty which was not subject to adjudication, because it had been decided over 170 years ago by the 1821 *uti possidetis juris* as well as by the recognition of the Republic of El Salvador and third Powers over 140 years ago.

As to the islands which he considers to be in dispute, namely Meanguera and Meanguerita, Judge Torres Bernárdez concurs with the other members of the Chamber in the finding that the island of Meanguera is today part of the sovereign territory of the Republic of El Salvador. The path whereby Judge Torres Bernárdez reaches this conclusion differs, however, from the one followed in the Judgment. In his opinion, the island of Meanguera, as well as the island of Meanguerita, belonged in 1821 to the Republic of Honduras by virtue of the *uti possidetis juris* principle. He considers, therefore, that the inconclusive finding of the Chamber in this respect is not supported by the colonial titles and *effectivités* documented by the Parties. He finds, however, that the 1821 *uti possidetis juris* rights of Honduras in Meanguera were at a certain moment in time (well after the dispute arose in 1854) displaced or eroded in favour of El Salvador as a result of the State *effectivités* established by the latter in and with respect to the island and of the related past conduct of the Republic of Honduras at the relevant time vis-à-vis such *effectivités* and their gradual development. On the other hand, similar State *effectivités* on the part of El Salvador and related past conduct of Honduras being absent in the case of Meanguerita, Judge Torres Bernárdez concludes that the 1821 *uti possidetis juris* must needs prevail in the case of that island. This means that today, as in

1821, sovereignty over Meanguerita belongs to the Republic of Honduras. Judge Torres Bernárdez regrets that the Judgment failed to treat the question of sovereignty over Meanguerita on its own merits, and, having regard to the circumstances of the case, he rejects the applicability to Meanguerita of the concept of "proximity" as well as the thesis of its constituting an "appendage" of Meanguera.

Judge Torres Bernárdez endorses *in toto* the reasoning and conclusions of the Judgment concerning the substantive aspects of the "*maritime dispute*" with respect to both the "particular régime" of the Gulf of Fonseca and its waters and the entitlement of the Republic of Honduras, as well as the Republic of El Salvador and the Republic of Nicaragua, to a territorial sea, continental shelf and exclusive economic zone in the open waters of the Pacific Ocean seaward of the central portion of the closing line of the Gulf of Fonseca as that line is defined in the Judgement, delimitation of those maritime spaces outside the Gulf of Fonseca having to be effected by agreement on the basis of international law. Thus the rights of the Republic of Honduras as a State participating on a basis of perfect equality with the other two States of the Gulf in the "particular régime" of the Gulf of Fonseca, as well as the status of the Republic of Honduras as a Pacific coastal State, have been fully recognized by the Judgment, which dismisses some arguments advanced at the current proceedings aimed at occluding Honduras at the back of the Gulf.

As to the "particular régime" of the Gulf of Fonseca, Judge Torres Bernárdez underlines, in his Opinion, that the Gulf of Fonseca is a "historic bay" to which the Republic of Honduras, the Republic of El Salvador and the Republic of Nicaragua succeeded in 1821 on the occasion of their separation from Spain and their constitution as independent sovereign nations. The "historic" status of the waters of the Gulf of Fonseca was there when the "successoral event" took place. This means, in the opinion of Judge Torres Bernárdez, that the sovereign rights of each and every one of the three Republics in the waters of the Gulf cannot be subject to question by any foreign Power. But at the moment when the succession occurred the predecessor State had not -- administratively speaking -- divided the waters of the historic bay of Fonseca between the territorial jurisdictions of the colonial provinces, or units thereof, which in 1821 formed respectively one or another of the three States of the Gulf. Thus Judge Torres Bernárdez concludes that the Judgment is quite right in declaring that the historic waters of the Gulf which had not been divided by Honduras, El Salvador and Nicaragua subsequent to 1821, continued to be held in sovereignty by the three republics jointly, pending their delimitation.

In this connection, Judge Torres Bernárdez emphasizes that the "joint sovereignty" status of the undivided "historic waters" of the Gulf of Fonseca has, therefore, a "successorial origin" as stated in the Judgment. It is a "joint sovereignty", pending delimitation, which results from the operation of the principles and rules of international law governing succession to territory, the "historic waters" of the Gulf of Fonseca entailing, like any other historic waters, "territorial rights". Judge Torres Bernárdez also stresses that the present Judgement limits itself to declaring the legal situation of the waters of the Gulf of Fonseca resulting from the above and subsequent related development, i.e., to declaring the existing "particular régime" of the Gulf of Fonseca as a "historic bay" in terms of contemporary international law, but without adding elements of any kind to that "particular

régime" as it exists at present. The Judgement is not therefore a piece of judicial legislation and should not be read that way at all. Nor is it a Judgement on the interpretation and/or application of the 1917 Judgement of the Central American Court of Justice. Conversely, that 1917 Judgement is not an element for the interpretation or application of the present Judgement, which stands on its own feet.

By declaring the "particular régime" of the historic bay of Fonseca in terms of the international law in force, and not of the international law in force in 1917 or earlier, the Chamber, according to Judge Torres Bernárdez, has clarified a number of legal issues such as the "internal" character of the waters within the Gulf, the meaning of the "one-marine-league" belt of exclusive jurisdiction over them, the "baseline" character of the "closing-line" of the Gulf, and the identification of those States which participate as equal partners in the "joint sovereignty" over the undivided waters of the Gulf. The individual elements now composing the "particular régime" of the Gulf of Fonseca declared by the Judgment vary, however, in nature. Some result from the succession, others from subsequent agreement or concurrent conduct (implied consent) of the three nations of the Gulf as independent States. In this respect Judge Torres Bernárdez refers to the "maritime belt" of exclusive sovereignty or jurisdiction -- considered by the Judgment as forming part of the "particular régime" of Fonseca -- as one of those elements of the "particular régime" which possess a "consensual" origin, pointing out that scope of the States' present consent to the "maritime belt" had not been pleaded before the Chamber. It follows, in his view, that any problem which might arise concerning entitlement to, delimitation of, location, etc., of "maritime belts" are matters to be solved by agreement among the States of the Gulf.

As to the competence of the Chamber to effect "delimitations" -- a question relating to the interpretation of paragraph 2 of Article 2 of the Special Agreement on which the Parties were greatly at variance --, Judge Torres Bernárdez considers that the issue has become "moot" because of the Judgment's recognition of rights and entitlements of the Republic of Nicaragua within and outside the Gulf. As a result of this supervenient "mootness", Judge Torres Bernárdez, invoking the jurisprudence of the Court, considers that Judgment should have refrained from making any judicial pronouncement on the said interpretative dispute. As to the substance of this dispute, Judge Torres Bernárdez concludes that the Chamber was competent to effect "delimitations" under Article 2, paragraph 2, of the Special Agreement, dissociating himself from the finding to the contrary of the majority of the Chamber.

Lastly, Judge Torres Bernárdez expresses his agreement with the tenor of the Declaration appended by Vice-President Oda. In the view of Judge Torres bernárdez, a non-party State intervening under Article 62 of the Statute -- as the Republic of Nicaragua in the current proceedings -- is under certain obligations of a kind analogous *mutatis mutandis* to that provided for in Article 63 of the Statute, but the Judgment as such is not *res judicata* for Nicaragua.

Dissenting opinion of Judge Oda

In his dissenting opinion Judge ODA states that, while he is in agreement with the Chamber's findings on the disputes concerning the land frontier and the islands, his

understanding of both the contemporary and the traditional law of the sea is greatly at variance with the views underlying the Judgment's pronouncements in regard to the maritime spaces. He considers that the concept of a "plurl-State" bay has no existence as a legal institution and that consequently the Gulf of Fonseca is not a "bay" in the legal sense. Neither was the Chamber right to assume that it belonged to the category of a "historic bay". Instead of its waters being held in joint sovereignty outside a three-mile coastal belt, as the Chamber holds, they consist of the sum of the territorial seas of each State.

In the contemporary law of the sea, Judge Oda explains, waters adjacent to coasts have to be either "internal waters" -- the case of (legal) "bays" or of "historic bays" counting as such -- or territorial waters: there is no third possibility (excepting the new concept of archipelagic waters, not applicable in the instant case). But the Chamber has obscured the issue by employing vocabulary extraneous to the past and present law of the sea. Its assessment of the legal status of the maritime spaces thus finds no warrant in that law.

Judge Oda supports his position with a detailed analysis of the development since 1894 of the definition and status of a "bay" in international law, from the early work of the Institut de droit international and International Law Association, to the most recent United Nations Conference on the Law of the Sea, passing through arbitral case-law and the opinions of authoritative writers and rapporteurs.

Judge Oda lists five reasons why full weight should not have been given to the conclusions of the Central American Court of Justice in 1917 to the effect that the waters of the Gulf were subject to a condominium, created by joint inheritance of an area which had constituted a unity previous to the 1821 succession, except for a three-mile coastal belt under the exclusive sovereignty of the respective riparian States, and he points out the exiguity of the area remaining after deduction of that belt. Indeed, the Central American Court appears to have acted under the influence of a sense prevalent among the three riparian States that the Gulf should not remain open to free use by any other State than themselves, and to have authorized a *sui generis régime* based on a local illusion as to the historical background of law and fact. Yet there is no ground for believing that, prior to 1821 or 1839 either Spain or the Federal Republic of Central America had any control in the Gulf beyond the traditional cannon-range from the shore. Both the 1917 and the present Judgment depend on the assumption that the Gulf waters prior to those dates not only formed an undivided bay but lay also *as an entirety* within a single jurisdiction. But at those times there did not exist any concept of a bay as a geographical entity possessing a distinct legal status. Moreover, even if in 1821 or 1839 all the waters of the Gulf did possess unitary status, the natural result of the partition of the coasts among three new territorial sovereigns would have been the inheritance and control by each one separately of its own offshore waters, a solution actually reflected in the acknowledgement of the littoral belt. Judge Oda considers that by endorsing that belt and treating it as "internal waters" the Chamber's Judgment has confused the law of the sea. It similarly relies on a concept now discarded as superfluous when it describes the maritime spaces in the Gulf as "historic waters"; this description had been used on occasion to justify the status either of internal waters or of territorial sea, though not both at once, but the concept had never existed as an independent institution in the law of the sea.

As to the true legal status of the waters of the Gulf of Fonseca, Judge Oda find that there is no evidence to suggest that, as from the time when the concept of territorial sea emerged in the last century, the claims of the three riparian States to territorial seas in the Gulf differed from their claims off their other coasts, though El Salvador and Honduras eventually legislated for the exercise of police power beyond the three-mile territorial sea and Nicaragua reportedly took the same position, which received general acceptance. Neither did their attitudes in 1917 feature a common confidence in rejecting the application to all the Gulf waters of the then prevalent "open seas" doctrine, even if they all preferred that an area covered entirely by their territorial seas and police zones should not remain open to free use by other States -- a preference behind their common agreement in the instant proceedings to denominate the Gulf (erroneously) as a "historic bay".

The boundary line drawn by the Honduran/Nicaraguan mixed commission in 1900 demonstrated that at any time the waters of the Gulf could be so divided, though as between El Salvador and Honduras the presence of scattered islands would have complicated the task. Whatever the status of such divided waters may earlier have been, the Gulf of Fonseca must now be deemed entirely covered by the respective territorial seas of the three riparian States, given the universally agreed 12-mile limit and the claims of Latin-American States that contributed to its acceptance. No maritime space exists in the Gulf more than 12 miles from any of its coasts.

Beyond establishing the legal status of the waters, the Chamber was not in a position to effect any delimitation. Nevertheless, Article 15 of the 1982 UN Convention on the Law of the Sea, providing for delimitation, failing agreement, by the equidistance method unless historic title or other special circumstances dictate otherwise, should not be ignored. Judge Oda points out that application of the equidistance method thus remains a rule in the delimitation of the territorial sea, even if that of achieving "an equitable solution" prevails in the delimitation of the economic zone and continental shelf of neighbouring States.

Against that background, Judge Oda considers the right of Honduras within and without the Gulf. Within it, Honduras is in his view not entitled to any claim beyond the meeting-point of the three respective territorial seas. Its title is thus locked within the Gulf. In its decision as to the legal status of the waters, the Chamber seems to have been concerned to ensure the innocent passage of Honduras vessels, but such passage through territorial seas is protected for any State by international law. In any case, the mutual understanding displayed by the three riparian States should enable them to co-operate, in keeping with the provisions on an "enclosed or semi-enclosed sea" in the 1982 Convention.

As for the waters outside the Gulf, Judge Oda cannot accept the Chamber's finding that, since a condominium prevails up to the closing-line, Honduras is entitled to a continental shelf or exclusive economic zone in the Pacific. That conclusion flies in the face of a geographical reality such as there can never be any question of completely refashioning. Whether Honduras, which possesses a long Atlantic coastline, can be included in the category of "geographically disadvantaged States" as defined by the 1982 Convention is open to question. This does not, however, rule out the possibility of its beings granted the right to fish in the exclusive economic zones of the other two States.

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LIVROS E REVISTAS

AS GRANDES MANOBRAS DE ITAIPU: ENERGIA, DIPLOMACIA E DIREITO NA BACIA DO PRATA

Christian Guy Caubet, Editora Acadêmica, São Paulo, 1991.

É possível que o livro do Professor Christian Caubet não chame a atenção da média dos visitantes de livraria. O título que aparece na sua capa -- "As Grandes Manobras de Itaipu" -- pode dar a impressão de que se trata de mais um trabalho periodístico sobre uma pendência diplomática que ocupou considerável espaço na imprensa brasileira e argentina na década de 70, mas que hoje só interessa aos estudiosos das nossas relações internacionais. Nada mais falso. Trata-se de um trabalho acadêmico sério e bem pesquisado, escrito inicialmente como tese de doutorado e atualizado com elementos posteriores à sua redação inicial, entre os quais os estudos da Comissão de Direito Internacional da ONU. Acredito que seja também a obra mais abrangente sobre a pendência diplomática entre o Brasil e a Argentina em torno da exploração dos recursos hidroelétricos do médio Paraná.

O tema central do livro é a evolução dos aspectos jurídicos da controvérsia argentino-brasileira desde a assinatura da Ata de Iguaçu, em 22 de junho de 1966, pelos Ministros da Relações Exteriores do Brasil e do Paraguai, até a conclusão do tratado tripartite de 19 de outubro de 1979, que pôs fim á pendência. A ênfase do trabalho recai sobre os aspectos jurídicos do problema em exame, sem perder de vista, porém, o pano de fundo representado pelos interesses dos três países diretamente envolvidos na questão. Segundo o próprio autor, "a análise dos papéis, reais ou supostos, dos diversos Estados que são partes interessadas no aproveitamento hidrelétrico do Paraná, é um elemento essencial para a compreensão dos fenômenos especificamente jurídicos, podendo esses, depois, ser abordados com pleno conhecimento das causas de que são efeitos mais ou menos diretos" (pág. 114).

Dentro do enfoque adotado, o texto move-se com desenvoltura entre três elementos principais -- o direito fluvial regional, o direito internacional geral e os interesses político-econômicos em jogo, tais como percebidos pelos três Estados diretamente afetados. Assim, o capítulo 1, aborda o tratamento jurídico do aproveitamento do médio Paraná, numa fase em que todos parecem procurar manter as divergências "sob o

controle dos Estados interessados, no plano regional" (pág. 34); o capítulo 2, ainda voltado para aspectos jurídicos, mostra como os entendimentos aparentemente obtidos no âmbito regional passam a ser questionados, por iniciativa da Argentina, em foros internacionais; já o capítulo 3 focaliza as opções diplomáticas essenciais dos três Estados diretamente envolvidos, no intuito de "procurar o que encobre a vontade afirmada de entendimento na bacia do Prata" (pág. 35); o capítulo 4 oferece uma espécie de contraponto jurídico ao anterior, examinando os elementos jurídicos que, em última análise, cristalizam as posições brasileira e argentina no plano do direito internacional; já no capítulo 5, o autor deixa em segundo plano a pendência sul-americana para examinar os aspectos relevantes do direito fluvial no quadro do direito internacional geral. E assim o autor prossegue o exame do tema, tecendo o fio de sua exposição entre os três elementos principais já indicados. O trabalho termina com o exame do acordo tripartite de 1979, suas conseqüências para a cooperação entre o Brasil e a Argentina e a contribuição do direito regional ao direito internacional geral.

Além de reunir em um volume um acervo de pesquisa que, tanto quanto é do meu conhecimento, não se encontra em nenhum outro trabalho individual, o livro do Professor Caubet se destaca pela preocupação constante de relacionar o problema jurídico regional com o seu tratamento no plano do direito internacional geral e, ambos, com a realidade econômico-política contemporânea. Assim, é interessante ler, da pena de um delegado suíço a uma convenção assinada em 1923, não ser conveniente que "para a construção de uma barragem num dado país, cada um dos Estados atravessados pelo curso de água em questão fosse admitido a emitir opinião sobre a maneira como a barragem devia ser construída" (pág. 33). Trata-se de opinião que poderia ter sido subscrita por um representante brasileiro cinqüenta anos mais tarde. Ainda no tocante á interrelação realidade nacional-direito internacional, são interessantes as observações do autor sobre o quanto a rejeição de todo elemento de supranacionalidade limitou, na prática, a utilização dos instrumentos jurídicos regionais para a consecução dos objetivos proclamados de cooperação e de integração. Em decorrência de tal atitude, "as instituições da bacia do Prata, na realidade, contribuíram para a criação de um espaço privilegiado, destinado à observação e ao controle da ação empreendida pelos Estados membros" (pág. 116). Esta contradição entre objetivos declarados e meios efetivos não é vista, entretanto, por Caubet como condenação definitiva das instituições regionais. Na opinião do autor, ela pode ser -- e em certa medida parece estar sendo -- resolvida "pela dinâmica das trocas e por aquela que é própria às instituições, no interior de um sistema comum a todas às partes, e à exclusão de qualquer outro interveniente" (pág. 116).

Estudioso de direito e de relações internacionais, o Professor Caubet encontra-se particularmente qualificado para tratar um tema em que tão claramente se mesclam o jurídico e o político. Seu livro, pela amplitude da pesquisa realizada e pelo cuidado com que o autor trabalhou o material coletado, é obra da maior relevância para o estudioso da pendência brasileiro-argentina sobre Itaipu ou, mais genericamente, das relações entre os dois países nas décadas de 60 e 70.

Luis A. P. Souto Maior